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REPORTS OF CASES

ARGUED AND DETERMINED IN THE

Supreme Court of Appeals

—OF—

WEST VIRGINIA

AT THE FALL-SPECIAL TERM, 1894, AND THE
JANUARY, SPRING-SPECIAL, JUNE AND
FALL-SPECIAL TERMS, 1895,

—BY—

THOMAS S. RILEY,

ATTORNEY-GENERAL AND EX OFFICIO REPORTER.

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JUDGES
OF THE
SUPREME COURT OF APPEALS

DURING THE TIME OF THESE REPORTS.

HENRY BRANNON, President.
***HOMER A. HOLT, President.**
JOHN W. ENGLISH.
MARMADUKE H. DENT.

ATTORNEY-GENERAL AND EX OFFICIO REPORTER,

THOMAS S. RILEY.

CLERK,
O. S. LONG.

***Elected President of the Court at the opening of the January Term, 1895.**

ERRATA.

- Page 9, line 22—For “26 S. 117” read “26 S. C. 117.”
- “ 10, “ 1— “ *Huckshould*” read “*Huckshold*.”
- “ 10, “ 7—After “what” read “extent.”
- “ 36, “ 18— “ “*Glft*” read “to.”
- “ 37, “ 2—For “*Minn*” read “*Min*.”
- “ 41, “ 6— “ “32 W. Va.” read “32 W. Va. 14.”
- “ 58, “ 32— “ “*Case*” read “*Sale*.”
- “ 66, “ 8— “ “7” read “6.”
- “ 130, “ 15— “ “34 W. Va. 709” read “34 W. Va. 799.”
- “ 155, “ 8— “ “*Mlter*” read “*Miller*.”
- “ 171, “ 32— “ “44” read “449.”
- “ 205, “ 7— “ “60” read “69.”
- “ 229, “ 33— “ “14” read “13.”
- “ 240, “ 16— “ “438” read “488.”
- “ 275, “ 29— “ “*McCay*” read “*McKay*.”
- “ 339, “ 30— “ “or” read “of.”
- “ 351, “ 4— “ “or an appeal writ of error” read “or appeal or writ of error.”
- “ 360, “ 35— “ “*Brocmie*” read “*Broome*.”
- “ 419, “ 2— “ “*Kretzer v. Wysong*, 6 Rand. (Va., 8” read “*Kretzer v. Wysong*, 5 Gratt. 9; *Cooke v. Thornton*, 6 Rand. (Va.) 8.”
- “ 440, “ 3—After “*Railway Co. v. Salmon*” read “14 *Kan.* 524.”
- “ 456, “ 2—Omit first “the.”
- “ 489, “ 21—After “Va.” read “96.”
- “ 492, “ 8—For “he” read “it.”
- “ 496, “ 20— “ “203” read “263.”
- “ 629, “ 10— “ “*Commissioner*” read “*Commissions*.”
- “ 648, “ 2— “ “15” read “156”
- “ 743, “ 3— “ “29 W. Va.” read “39 W. Va.”
- “ 782, “ 9— “ “testate” read “estate.”



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REPORTS OF DECISIONS
OF THE
Supreme Court of Appeals
OF WEST VIRGINIA.

Fall-Special Term, 1894.

CHARLESTON.

STATE v. SHAWN.

Submitted June 23, 1894.—Decided November 24, 1894.

1. ARGUMENT OF COUNSEL—CRIMINAL LAW.

Counsel necessarily must be allowed considerable latitude in the argument of a case, and, unless the court in a felony trial permits counsel for the state to so far transgress the rule of propriety as clearly to prejudice the prisoner, the judgment will not be reversed because of improper remarks by counsel made to the jury in argument.

2. ARGUMENT OF COUNSEL—REMARKS OF COUNSEL.

Where a criminal trial is in other respects fair, a verdict of conviction will not be set aside by this Court for improper remarks of counsel, where it is plainly warranted by the evidence in the case under the law, and no other verdict could have been found without misconduct by the jury.

MONROE & WOODS for plaintiff in error, cited 20 W. Va. 32, 714; 34 Am. Rep. 751; 58 Am. Rep. 647 and notes; 56 Am.

40	1
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40	1
49	716
49	719
50	224
50	225
40	1
58	687
40	1
60	582
40	1
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ATTORNEY-GENERAL T. S. RILEY for the State, cited 31 W. Va. 493; 5 Am. St. Rep. 882.

W. B. CORNWELL for the State, cited Abbott's Trial Brief, 712 and authorities there cited.

BRANNON, PRESIDENT :

On the 30th day of September, 1893, Daniel Shawn was by the Circuit Court of Hampshire county sentenced to be hanged for the murder of Absalom Izer.

Daniel Shawn and Absalom Izer were brothers-in-law, having married sisters. They lived in McDowell's Hollow, about four miles south of the town of Romney, and about three fourths of a mile east of the river road. Their houses were about two hundred yards apart. They were engaged in getting out and hauling tan bark together, each man having for this purpose a team of two horses and a wagon. To get to their place from Romney, it is necessary to pass through the tollgate about a mile and a quarter from the town, and, keeping the river road for two or three miles, to turn to the left through a gate known as "McDowell's" gate, into the said McDowell's Hollow. From the said gate the road leads through the woods through the said hollow for about three-fourths of a mile, to the houses of said Shawn and Izer. Izer was a larger and stronger man than Shawn. On the 23d day of June, 1893, both men were in Romney, with their horses and wagons and their wives, Izer having also his son, and taking out with him in his wagon several friends. They had both been drinking during the day. Shawn needed another horse. A certain Abel High, having a horse to sell, was in town on the aforesaid 23d day of June, and was told by one Joseph A. Pancake that Shawn wanted to buy a horse, whereupon the said Pancake and High went to hunt for Shawn. They found him standing with Izer in front of the courthouse. High and Shawn then began to ar-

range the terms upon which the horse should be sold. Shawn stated that he would like to have six months in which to pay for it; whereupon Izer interfered, and told Shawn that he should not have but till December; that he must have his (Izer's) bark hauled in by that time. Shawn replied that, by the terms of his contract with Izer, he had till the 1st of the next June to haul in said bark. Pancake advised them to go home and cool off, upon which Izer told him to shut his mouth, or he would slap it for him. To this Shawn made no reply whatever, but turned and left in a peaceable manner. Soon after, he left town in his wagon, with his wife. A witness, one Harmison, testified that on the day aforesaid, he was out in his stable, and heard loud talking and swearing. He looked out of the stable door, and saw Shawn driving furiously out of town, and heard him say, with an oath, "Some people can have anything they want, but I can't have anything." The witness heard Shawn's wife remind him that he was still within the corporation. Shawn replied that he would fix him at the tollgate. Shawn was beating his horse, and swearing. Witness heard prisoner mention no names, and could not say whether he referred to Izer or not. Witness was about two hundred yards from the prisoner. Shawn testified that he was exasperated at one of his horses at the time Harmison saw him, and that he was beating it, and swearing at it, and did not have a thought in reference to Izer at that time. When the prisoner got to the aforesaid McDowell's gate, he unhitched his horses, and left his wagon there, as was his custom; took the horses on up the hollow, and put them away. He then went into the house, took down his gun, and told his wife and mother that he was going to see Joe Pancake, and give him back his horse (which he had bought from him some time before, and had not paid for) and gears; that he was tired of this place; that he could not live here in peace; and that he was going some place where he could live in peace. He then went on down the hollow, and was next seen on the river road, at the aforesaid McDowell's gate. It was a habit of the prisoner to take his gun with him when walking alone. Just before the shooting, one James P. Stump passed Shawn sitting on the

roadside at the aforesaid gate. Witness asked the prisoner what he was waiting for, and prisoner answered that he was waiting to see Joe A. Pancake. Said Pancake had to pass along the river road to get to his home, from Romney. About five minutes after the witness Stump passed, Izer drove up in his wagon with his wife, little son, and several friends. His nephew was riding one of the horses, and driving. When Shawn saw Izer, he rose up, and said: "Aps Izer, what in the hell are you always putting your mouth in my business for?" Izer replied, "I haven't, Dan." Shawn then proceeded to swear some more, and make threats. Mrs. Izer testified that she got out of the wagon, and caught hold of the prisoner, and told him that his gun was scaring her son into spasms, and he answered that the gun would do no harm. She further entreated him for her sake, if not for "Aps'," not to shoot. The prisoner answered again that the gun would do no harm, and he pointed it to the ground. Izer told the boy to drive on. After a few more angry words addressed to Izer, he (Shawn) kneeled on one knee, and shot just as the wagon was going through the gate. Izer fell out of the wagon, upon the side of the road, dead. Shawn threw his gun down, almost striking Izer in the face, and said, "There's the damned old gun;" then, turning to Izer's wife, said, "Now, you can hang me, or do what you please with me;" after which he ran. Shawn himself testified that the above, as told by the witnesses for the state, was in the main correct, but that he was leaving the wagon when Izer, swearing at him, attempted to get out of the wagon, threatening to whip him, saying, "God damn you, son of a bitch, if I get out, I will fix you," when he shot. He also denied getting on one knee to shoot. Shawn had been sitting on the right side of the road, and Izer was on the right side of the wagon, during the quarrel at the said McDowell's gate. The shot took effect in the right side of the head, behind the ear, and in the right shoulder, rather behind. Some of the shot penetrated the brain, and caused death. Dr. Berkley, who held the post mortem examination, testified that Izer, in his opinion, had his back to prisoner, and was looking back at him. In the morning, Shawn

came to town, and gave himself up. There was no evidence produced on the trial as to the previous reputation of either Izer or Shawn.

The prisoner's motion for a new trial, because the verdict finding him guilty of murder in the first degree was not warranted by the evidence, must be overruled; for that verdict is fully and decidedly sustained by the facts.

But the chief ground on which the prisoner's counsel asks relief from his client's death sentence is on account of certain improper remarks by the prosecuting attorney in his closing argument before the jury. When the prosecuting attorney had finished his opening argument to the jury, in which he asked them to find an unqualified verdict of murder of the first degree, so that the penalty of death should be inflicted upon the prisoner, the counsel for the prisoner, admitting in their arguments that the evidence warranted a verdict of murder in the second degree, argued against the infliction of the death penalty, as asked for by the prosecuting attorney, and in favor of the alternative punishment of confinement for life in the state penitentiary. After the counsel for the prisoner had concluded their arguments to the jury, and when the prosecuting attorney was closing the argument for the state, having demanded in his argument an "unqualified verdict of murder in the first degree," or "the death penalty," he proceeded to argue against the alternative penalty of a life sentence in the penitentiary, because of the assumed fact that the prisoner, if sentenced to life imprisonment, would be liberated in a few years, and in this connection called the attention of the jury to the anarchists of Chicago and the action of the governor of Illinois, to which the prisoner, by his counsel, objected; and the court "suggested that the attorney was perhaps going too far away for examples," but gave the jury no instructions in reference thereto. Proceeding, he said: "If you sentence him to the penitentiary for life, it won't be five years till he will be let out on some excuse or pretext, and return home, to enter upon a new course of crime." He further said: "This (meaning the homicide for which the prisoner was on trial) is the grand culmination of an epidemic of crimes that

have been committed in this county." He further said, referring to the prisoner: "He is so steeped in crime that he has no friend to sit beside him during the trial."

There have been very many decisions in different states as to when improper remarks by counsel in advocacy before juries shall call for reversal and new trial. Detailed reference at large to them would be wearisome and useless. It is impossible upon such a subject to formulate a general rule infallibly applicable in all cases. Each case is tested by itself, in a measure. In *Shores' Case*, 31 W. Va. 491 (7 S. E. Rep. 413) this Court said; "Counsel must necessarily be allowed considerable latitude in the argument of a case, and unless the court, in a felony trial, permits counsel for the state to so far transgress the rule of propriety as clearly to prejudice the prisoner, the judgment will not be reversed because of improper remarks by counsel made to the jury."

The occurrences in great criminal trials are so many and diverse, the pressure, heat, and excitement of counsel in the struggle are often so intense, that it is well nigh impossible for counsel to guard themselves so exactly and scrupulously as to avoid some remarks outside the boundary of exact propriety, or for the court to be so actively alert as to prevent them; and, if this Court were in all cases of irregularity in this respect to overturn verdicts, few convictions would stand. Great latitude of argument is allowed in trials in this state; too much, I think. Counsel charged with the responsible duty of prosecuting parties charged with crime should remember that they are not merely advocates, but public officers, not bound to convict, but to do the prisoner justice as a debt due to him, and give him a calm, deliberate, fair trial, even though his counsel in his defense has transgressed the true line of advocacy. Their closing arguments are tremendous weapons against the unfortunate prisoner, tremendous to vindicate the cause of public justice, and tremendous to inflict injustice upon the helpless accused, if they are charged with passion and prejudice, or distort the law or facts, or bring in irrelevant or unproven facts. Some courts have been very sensitive upon this subject, and have reversed convictions in a few instances upon

apparently inadequate causes; but, as a general thing, reversals for this cause have been where there were gross abuses of the privilege of counsel. We must in each case look to the circumstances. Under the rule in this state, as propounded in *Shores' Case*, we must see that the case is one of improper conduct in counsel, and the impropriety such as "clearly to prejudice the prisoner." The Texas court, which has in various cases been very liberal to defendants in this matter, lays down the rule that "the abuse of counsel's privilege in argument, in order to warrant a new trial, must have been so gross as to prejudice the prisoner's rights." *McConnell v. State*, 58 Am. Rep. 647 and note (3 S. W. 699). In North Carolina the abuse by counsel must be gross and manifestly prejudicial to the prisoner. *State v. Underwood*, 77 N. C. 502. The current of authority elsewhere corresponds with these principles. In most instances where reversals have been ordered for remarks of counsel, the counsel stated and argued upon facts not in evidence bearing on the guilt of the accused, and in a few indulged in intemperate abuse of the accused. As a case must be tried by the evidence, the assertion of facts not proven calculated to influence the jury is generally effectual to establish error. But, with the exception of perhaps the statement that the prisoner was so steeped in crime that he had no one to sit beside him during his trial, such is not the case in this instance, and that statement was one based on and derivative from the evidence. Surely, we ought not to reverse a conviction, for what is simply a claimed inference or deduction from facts in evidence. The evidence showed a sedate and atrocious murder by the accused, and that his mind was so bent upon the bloody deed that the prayers and wails of the wife and child of his victim were powerless to stay his hand; and can it be that we must annul this trial because the prosecuting attorney, on these facts, declared him steeped in crime so that no friend was present to comfort him in his hour of trial? The evidence showed him wicked, and desperately bent on great crime. Strong language, but the facts were strong, and such language is com-

mon in the warmth and feeling of such trials. Must a court reverse for every such passage?

The declaration by the prosecutor that, if the prisoner were sentenced to life imprisonment, he would be liberated in a few years, and would return home to enter upon a new course of crime, was no statement of fact bearing on the guilt of the accused, but a mere expression of opinion or guess, which the intelligence of the jury would rate only as such. And, indeed, was it a reprehensible opinion? The jury was the sole judge whether the prisoner should die or suffer lifelong imprisonment, as the law lodges that discretion with it. By what considerations is the jury to exercise this discretion? Certainly, it can look at the hue of the crime as revealed by the evidence; and can not the jury consider whether the circumstances of the crime show its perpetrator to be a desperate man, and an enemy of society, and dangerous, should he escape or be pardoned? The choice between the two modes of punishment, in case the jury find the crime murder in the first degree, is absolute with the jury, and it is difficult to limit the considerations which shall govern a jury if deducible from the nature of the crime and its perpetrator as manifested by the evidence. For myself, I can not say the remarks of counsel now in hand were legally condemnable. The reference to the pardon of the Chicago anarchists by the governor of Illinois was discounted and neutralized by the judge, and besides, and while irrelevant, the common sense of the jury would reject it; and it would be going far and according it undue influence to say that it figured as a factor in the decision of the jury. And, in addition to the weakness of the remarks above spoken of to affect the jury to the prisoner's prejudice, it is important to remember that they were called out from the prosecuting attorney by the fact that the prisoner's counsel had insisted upon a verdict in favor of life imprisonment instead of death, as I find it laid down in decisions in Michigan, North Carolina, and Vermont that improper remarks of counsel provoked by like remarks of opposing counsel, or in reply to such remarks, are not general-

ly regarded as calling for a reversal. Note on page 569, 9 Am. St. Rep.; *McDonald v. People* (18 N. E. Rep. 817.)

The statement by the prosecuting attorney that the crime was "the grand culmination of an epidemic of crimes that have been committed in this county" may be considered an appeal to local prejudice, was irrelevant, and ought not to have been made. It is the only matter that presents to me any question of seriousness in the case. But as to this and all the other remarks above stated we can not say that the prisoner was manifestly prejudiced or the verdict influenced by them. Here I refer again to the holding of this Court in *Shores' Case*, 31 W. Va. 491 (7 S. E. Rep. 413) that counsel must be allowed considerable latitude in argument, and, unless improper remarks are clearly to the prejudice of the defendant, there is no ground for a new trial; and that is especially the case with this Court. To justify reversal, it must appear that substantial rights of the party were prejudiced by the misconduct. Note to *McDonald's Case*, 9 Am. St. Rep. 569 (18 N. E. Rep. 817), citing *Shular v. State*, 105 Ind. 289 (4 N. E. Rep. 870); *Boyle v. State*, 105 Ind. 469 (5 N. E. Rep. 203); *Porter v. Throop*, 47 Mich. 313 (11 N. W. Rep. 174); and *State v. Robertson*, 26 S. 117 (1 S. E. Rep. 443). And, besides, it is important to consider that the circuit judge saw all the circumstances, surroundings, and phases of the trial, and did not regard these objections as calling for a new trial. It was well said in *Combs v. State*, 75 Ind. 221, that "to rigidly require counsel to confine themselves directly to the evidence would be a delicate task, both for the trial and appellate courts, and it is far better to commit something to the discretion of the trial court than to attempt to lay down or enforce a general rule defining the precise limits of the argument. If counsel make material statements outside of the evidence, which are likely to do the accused injury, it should be deemed an abuse of discretion and a cause of reversal; but when the statement is a general one, and of a character not likely to prejudice the accused in the minds of honest men of fair intelligence, the failure of the court to check counsel should not be deemed such an abuse of discretion as to require a reversal." In

Huckshould v. Railroad Co., 90 Mo. 548 (2 S. W. 794) the court said: "The trial judge, who had heard the speeches of opposing counsel, and knew what, if anything, was said to provoke the last remarks of counsel in his closing speech, was in a better position than we are to determine whether he should or should not interfere; and as to when, how, and to what a trial judge may interfere in any case must depend on a sound discretion." In *Railroad Co. v. Gurley*, 12 Lea 46, cited in *Martin v. State*, 56 Am. Rep. 817, the court said: "The conduct of the trial must necessarily be left largely to the discretion of the presiding judge—a discretion which can not, in its very nature, be made a subject of review by this Court, except in a clear case of abuse of that discretion. If new trials were granted for remarks of counsel in the heat of debate, merely because they exaggerated the rights of the client, or went beyond the strict letter of the law, very few verdicts, we fear, would stand. These departures may generally be left to the criticism of opposing counsel in reply and the good sense of the jury in making allowance for the zeal of the speaker." Must we not attribute intelligence and discrimination to juries? They are capable of discarding improprieties. It would be impossible to carry on judicial proceedings upon the theory that everything, even if somewhat improper, that reaches the ears of jurors, affects their final determination beyond all power of resistance on their part. And there is a further weighty or conclusive consideration—the case made by the evidence was so strong against the accused that his counsel conceded before the jury that he was guilty of murder in the second degree, and virtually conceded it in the first degree, and only asked a verdict for a life term in the penitentiary, rather than death; and the evidence abundantly sustains the finding of murder in the first degree. If the remarks of counsel had not been made, the verdict ought to have been murder in the first degree. They could only bear on the mode of punishment, and we see that death is not an undue punishment for the deed, and the jury was vested with absolute discretion to impose it or not. This being so, ought we to set aside a verdict plainly right under the evidence, merely for

those remarks? There is no objection to the trial in any other respect. If the trial is in all other respects fairly conducted--and it is apparent that no other verdict could have been rendered without misconduct on the part of the jury--the verdict will not be set aside. Note to *McDonald's Case*, 9 Am. St. Rep. 569 (18 N. E. Rep. 817); *Lamar v. State*, 65 Miss. 93 (3 South. 78) *State v. Weiners*, 66 Mo. 13. In *Pence v. State* (Ind.) 58 Am. R. 651, note, the court said: "Upon the evidence, it seems to us that the conviction was at all events inevitable; and, as the punishment does not seem to have been out of proportion with the offense, we can not see that there could have been any prejudice to the substantial rights of the appellant. In such a case we are not authorized to reverse." Abb. Cr. Tr. Brief, § 712, is referred to as sustaining this doctrine, but it is not in our library.

Therefore, we are compelled to affirm the sentence.

As the day fixed in the judgment for the execution of the sentence of death has passed, owing to the pendency of this writ of error, the Circuit Court must cause the prisoner to be brought before it, and fix another day for execution, for which purpose the case is remanded to that court. Whar. Cr. Pl. & Pr. § 916; 2 Hawk. P. C. c. 51, § 7; 2 Bish. Cr. Proc. § 1311.

As judgments imposing the death penalty usually, if not invariably, in this state, specify the date of execution, it often happens that owing to appellate proceedings, that day passes, necessitating the fixing of another date. Just how this practice of naming the day in the sentence became established in Virginia is not certain, but likely from the form of judgment in murder cases adopted in June, 1752, by the judges of England, under section 3, chapter 37, of the statute 25 Geo. II., which required the judgment to specify the day of execution. 1 East Cr. Law, 373; 4 Bl. Comm. 202. And even under the act it was held that the requirement that the day be fixed in the judgment was directory, and did not form a necessary part of the sentence. *Rex v. Wyatt* (1812) Russ. & R. 229; 1 Chit. Cr. Law 782. That statute is not in force here, but, having been once in force in Virginia, the

practice under it has likely continued in use. Then, what is the English common-law on the point? It is certain that before said statute of Geo. II., the time and place of the execution of the death penalty constituted no part of the judgment. 1 Chit. Cr. Law 782; 2 Hale, P. C. 399; *Rex v. Rogers*, 3 Burrows 1812; Whart. Cr. Pl. & Pr. § 916; 1 Bish. Cr. Proc. § 1311; *Cathcart v. Com.*, 37 Pa. St. 115; 4 Am. & Eng. Enc. Law 728; *Webster v. Com.*, 5 Cush. 386. It is left to the sheriff to fix the time of execution, since, when the sentence is pronounced, he is charged in general language by the statute with simply the duty of execution, and it is not an essential part of the judgment. Act. Va. Dec. 12, 1792, c. 66, s. 17 (1 Va. Rev. Code, 1803, s. 19) enacts that, "to prevent misconstruction, it is hereby declared that the sheriff of the county in which any district court shall sit shall execute all judgments rendered by such court in any criminal case." So said 1 Rev. Code (1819) c. 69, s. 40, as to sentences by Circuit Courts. Code Va. (Ed. 1849 and 1860) c. 209, s. 9, broadly provides that a copy of the death sentence shall be delivered to the sheriff, "who shall cause the sentence to be executed." Just so in section 9, chapter 160, of our own Code. The statute contains nothing requiring the time to be fixed in the judgment, which need only to conform to the common-law. As said by the California court, delay and inconvenience would be avoided by omitting the date of execution in the judgment. *Murphy's Case*, 45 Cal. 137.

DENT, JUDGE, (*dissenting*):

While I concur in the syllabus, I desire to enter my protest and dissent against the argument contained in the opinion and the conclusion reached by the court in this case.

The error complained of is that the prosecuting attorney, in his closing argument, having referred to the conviction, imprisonment, and pardon of the Chicago anarchists, said: "If you sentence the prisoner to the penitentiary for life, it won't be five years till he will be let out on some excuse or pretext, and return home to enter on a new course of crime." "This is the grand culmination of an epidemic of crimes

that have been committed in this county." "He is so steeped in crime that he has no friend to sit beside him during his trial." There was no evidence before the jury to justify any of these expressions. From them the jury might infer—and for this purpose they were evidently uttered—that the accused was guilty of many crimes, and this was the grand culmination of his wicked career, and that, if sent to the penitentiary, he would be back in five years, to repeat these crimes. What language could be stronger or more reprehensible? It was used for no other purpose than to arouse human passion, and prejudice the prisoner in the minds of the jury, converting them into an unreasonable mob, with vengeance in their hearts, rather than a calm deliberate tribunal of his fellow men, coolly reaching the unbiased verdict to which the law and evidence unerringly point.

The rule of the law is well settled that an attorney, through undue ardor to secure a conviction in accordance with his desires has no right to stir up the passion and prejudice of the jury by referring to matters irrelevant or facts not in proof. *Hatch v. State*, 34 Am. Rep. 751. Granting that the prisoner was guilty of murder in the first degree—which I do not pretend to dispute—the law, in tender consideration of human frailties, seeks to distinguish between the different degrees of depravity entering into each particular commission of the highest of crimes, and, in doing so, weighs the motives that led to the criminal act. That is to say, the man who kills because of bitter feelings rankling in his breast from a wrong or injury done him by his victim, even though it be imaginary, is not equally guilty with the man who kills in the commission of a felony, or for hatred of human kind generally, or for the love of human gore; hence the leniency of the law in permitting a jury to discriminate and fix the punishment of confinement in the penitentiary for life. The intemperate and unjustifiable language used by the prosecutor was to inflame the minds of the jury, and to prevent this discrimination on their part. He accomplished his purpose, which is the best evidence possible that the prisoner was prejudiced by his conduct.

In this case, while the killing was deliberate, the prisoner,

from his words and conduct, had even recently publicly suffered contumely and abuse on the part of his unfortunate victim, until life had become to him unbearable, and this injury, rankling in his heart, had driven him to desperation. His expression after the shooting is proof positive of this, when he says to his sister-in-law, "Now, you can hang me, or do what you please with me." These are the words of a man driven to despair, and fully conscious that he had placed his life in jeopardy, and without attempting to escape, he gave himself up to be dealt with as his fellow men should determine. Can such a man be equally guilty with the monster who destroys children because he hates the human race, or kills his wife and mother for their money, or, to satisfy his brutal lust, first outrages and then murders the victim of his horrible crime? Cain was a guiltier man, for he slew his innocent and confiding brother for an imaginary wrong; yet his maker permitted him to go free, though he denied his crime, with the admonition that, "who-soever slayeth Cain, vengeance shall be taken on him seven-fold."

The most solemn and awful duty that men are called upon to perform is to inflict the death penalty on their fellows, and it should be done only in extreme cases, when no other punishment will vindicate the law, and protect society against the totally depraved. The unwarranted, cruel and diabolical destruction of human life under the forms of law, even in the name of religion, by human agencies, has already been so great that, if entered up by divine justice against the human race as a race, must seal its eternal and everlasting condemnation. How careful, then, should we be, before we lend our sanction to the taking of life, that the accused has, beyond all reasonable doubt, had a fair and impartial trial before an unbiased jury of his fellow men, free from any undue influence of prejudice or passion. It is better that the guilty escape than any should be unjustly punished. And no man who is not totally depraved should be denied the opportunity which imprisonment for life affords him of repenting of his crimes, redeeming his life, and making preparation to stand before the bar of that all-wise

Judge, from whom no secret thing can be hidden, and who will condemn our disobedience to His statutes according to the standards we have created for our fellow men.

May He have mercy on the soul of Daniel D. Shawn when it is ushered into His presence in obedience to the final judgment of this Court.

CHARLESTON.

RICHARDSON *et al.* v. RALPHSNYDER *et al.*

Submitted June 15, 1894.—Decided December 1, 1894.

1. CIRCUMSTANTIAL EVIDENCE—FRAUDULENT ASSIGNMENT—FRAUDULENT INTENT.

In showing the fraud necessary to impeach a conveyance, the fraudulent intent of the parties may be shown by the circumstances attending the transaction. Circumstantial evidence is not only sufficient, but is often the only evidence that can be adduced.

2. CONFLICTING EVIDENCE—REVERSAL.

Where the decree complained of is based upon depositions which are conflicting and contradictory in their character, so that it is difficult to determine on which side they preponderate, and hard to draw a proper conclusion therefrom, and different judges might reasonably disagree upon the facts proved, the appellate court will refuse to reverse the decree of the court below, although the testimony may be such that the appellate court might have rendered a different decree if it had acted upon the case in the first instance.

3. CREDITORS' PETITION—PRIORITIES OF CREDITORS.

Creditors may come in by petition to a suit attacking a deed on the ground of fraud, and their priority will be determined by the date of filing their petition, unless they have other ground of priority.

4. FRAUDULENT ASSIGNMENT—CREDITORS—PRIORITIES OF CREDITORS.

Where an assignment of personal property is made in fraud of creditors, they, or any of them, may, in a court of equity, have the same set aside. The creditor who first files his bill obtains thereby a priority, and is entitled to be first paid from the proceeds of the sale of the property, if there are no valid prior liens.

40	15
42	580
42	637

40	15
43	10
43	561

40	15
44	235
44	749
45	487

40	15
46	230

40	15
47	37
47	44

47	247
47	682
47	835

40	15
48	460
48	661

40	15
50	678
50	680

40	15
51	317
52	215
52	602

40	15
53	297

40	15
54	191

40	15
55	497

40	15
57	187

40	15
62	120

5. CREDITORS' PETITION—FRAUDULENT ASSIGNMENT—EQUITY PRACTICE.

A creditor may file his petition in a cause pending which has for its object the vacation of a fraudulent conveyance, and, upon proper allegations, be made a party to the suit, and the bill, exhibits, answers, depositions, orders and decrees, and all the proceedings in said cause, may, upon proper prayer, be read as part of his petition.

W. W. BRANNON for appellant cited Code 1887, c. 125, s. 42; Starkie on Ev. (9th Ed.) 724; 6 W. Va. 274; 75 Va. 522; 84 Va. 341; 37 W. Va. 577.

D. M. WATRING, for appellees:

- 1.—*Voluntary Conveyance in whole or in part not good as to existing creditors.*—Bump. Fr. Conv. 262, 286; Code, c. 74, s. 2; 10 W. Va. 87.
- 2.—*Good faith of grantee need not be enquired into if conveyance is voluntary.*—Bump. Fr. Conv. 197; 24 W. Va. 730; 30 W. Va. 641.
- 3.—*Fraudulent on part of grantors; may be inferred from circumstances.*—Bump. Fr. Conv. 34, 43, 265; 8 Encyclopedia of Law 753; 17 W. Va. 717; 22 W. Va. 583; 32 W. Va. 515; 33 W. Va. 388, 452; 34 W. Va. 95; 35 W. Va. 719, 754.
515; 33 W. Va. 388, 452; 34 W. Va. 95; 35 W. Va. 719; 754.
- 4.—*Badges of fraud.*—Bump. Fr. Conv. 34, 36, 44, 50, 51, 52, 442; 1 Per. Fr. (4th Ed.) § 202, 203, 204, 205; 22 W. Va., *supra* (especially 594.)
- 5.—*On questions of fraud generally as applicable to this case.*—Bump. Fr. Conv. 53, 200, 201, 202; 8 Encyclopedia of Law 756 to 759; 22 W. Va., *supra*.
- 6.—*Not necessary to refer to a commissioner.*—27 W. Va. 210 (18 S. E. Rep. 376-7).
- 7.—*Reading evidence in original suit on petitions of Greer & Laing.*—Sand Eq. 688 (2d Ed.); 1 Barton's Chancery Practice 340, § 109; 27 Gratt. 287; 19 W. Va. 367; 30 W. Va. 443; 31 W. Va. 156 (159).

ENGLISH, JUDGE:

This was a suit in equity in which the bill was filed at the

October rules, 1889, in the Circuit Court of Preston county, by J. T. Goodwin, Louis Schrader and Henrietta Richardson, against George M. Ralphsnyder, Virginia Potter, widow and administratrix of William R. Potter, deceased, in her own right and as such administratrix, and J. Ami Martin, defendants. The object of this suit, as appears from the face of the bill (which greatly exceeds in length what is usually embraced in such proceedings) is to set aside as fraudulent a certain deed of conveyance which appears to have been executed by William R. Potter in his lifetime to the defendant George M. Ralphsnyder, which deed bears date the 31st day of January, 1887, and was admitted to record on the same day, and which deed purports to convey to said George M. Ralphsnyder a certain lot in the town of Kingwood, with the buildings and appurtenances thereon, together with the pump in the well, and the hose connected thereto, and also the whole stock of goods in the store-room on said lot, and the goods stored in the cellar, and to subject the same to the payment of a debt alleged to be due the plaintiffs from said William R. Potter of three hundred and forty two dollars and twenty three cents.

The material allegations of the bill are as follows: That the said William R. Potter purchased the lot of land, which is sought to be subjected, from the defendant Martin for the consideration of four hundred dollars. That after said purchase said Potter erected a large building thereon, to be used partly as a dwelling house and partly as a storehouse, and did occupy said building as a dwelling and storehouse until January 31, 1887, when he attempted to convey the same to George M. Ralphsnyder; that said Potter, for several years prior to said purchase, had been engaged in the business of retail merchant in said town, and had become largely indebted to various wholesale establishments and other parties in large sums of money, aggregating many hundred dollars: that said creditors became uneasy about their claims, and demanded payment, and threatened suit if the same were not soon paid; that being thus threatened and harassed, and fearing his property would be subjected to sale by his creditors, he determined to put his property out of his hands, for the

purpose of hindering, delaying and defrauding his creditors in and about the collection of their said debts; that, in order to consummate his design, he entered into a compact with the defendant George M. Ralphsnyder, under the advice of I. C. Ralphsnyder, a brother of said George M. Ralphsnyder, who at the time was attorney and counsel of said Potter, whereby he (the said Potter) should convey all of said property to said George M. for the sole purpose of hindering, delaying and defrauding his creditors, and especially the plaintiffs; that, in order to carry out said design and agreement, said Potter, being advised and assisted by the defendant George M. Ralphsnyder, and his brother I. C. Ralphsnyder, the attorney for said Potter, on the 31st day of January, 1887, pretended to convey to said George M. the said house and lot in the town of Kingwood, together with all the articles of merchandise therein contained, consisting of hardware, drugs, etc., for the pretended consideration of four hundred dollars cash in hand paid, and other considerations mentioned in the deed, which is exhibited, and in which the additional consideration appears to have been the assumption on the part of said George M. of the payment of two notes of one hundred dollars each, dated April 1, 1884, and April 1, 1885, which said Martin held against said Potter, which were liens on said real estate; that at the time of said pretended conveyance, and for a long time prior thereto, said Potter was indebted to plaintiffs in a large sum of money, and had been running an account with them since the 12th day of February, 1884, up and until the 21st day of January, 1887, just ten days before said pretended conveyance; that during that time said Potter had bought from plaintiffs merchandise aggregating one thousand one hundred and twenty eight dollars and sixty one cents, and had paid them seven hundred and eighty six dollars and thirty eight cents, leaving a balance due them at the time of said pretended sale of three hundred and forty two dollars and twenty three cents, exclusive of interest; that this was a dealing between merchant and merchant, and that the statute of limitations as between such parties only applied, and that they were entitled to interest on their account after sixty days, on general average; that the

merchandise of various kinds in said storeroom at the time of said pretended sale were, in the aggregate, in value far in excess of the whole price pretended to have been paid for both said merchandise and house and lot. That the merchandise in said house at that time was worth from eight hundred dollars to one thousand dollars, and that said house and lot were at that time, and are now, worth from eight hundred dollars to one thousand two hundred dollars; and that the said sum of six hundred dollars was grossly inadequate to the true value of said property; that it was not a valuable consideration, in law or in fact, and that the same was therefore fraudulent, null, and void as to the debts of creditors of said Potter, and especially as to the debts of plaintiffs; that the said George M. Ralphsnyder did not pay the pretended amount of four hundred dollars, or any other amount, or any consideration, upon the pretended purchase, neither was it intended at the time by either said Potter or said Ralphsnyder that the same should be paid by the said Ralphsnyder; that the recitals in said deed are false, and were made for the sole purpose of hindering, delaying and defrauding the creditors of said Potter, and especially the plaintiffs, about the collection of their debt; that at the time of said conveyance, or very soon thereafter, said George M. Ralphsnyder took charge and control of the notes and book accounts of said Potter, and proceeded to collect the same in his own right, and did collect large sums of money on said notes and book accounts in his own right and name, and has never turned over said money to said Potter, or to any one entitled to receive the same, and that at the time said notes and book accounts were turned over to said Ralphsnyder he did not pay anything to said Potter for them, but that said transfer or assignment of said notes and accounts to said Ralphsnyder was made with the full knowledge of both parties to the transaction, for the sole purpose of hindering, delaying and defrauding the creditors of said Potter, and especially the plaintiffs; that at the time of said pretended conveyance said George M. Ralphsnyder was not assessed with any property or money, and that he in fact did not have any money with which to purchase either real estate or personal prop-

erty, and pay for it; that only a portion of the two notes due said Martin, and assumed to be paid by said George Ralphsnnyder, has been paid, and that which has been paid was not paid out of funds belonging to said George M. Ralphsnnyder; that said George M. Ralphsnnyder had full and complete knowledge of the fraudulent intent of said Potter at the time of said conveyance, and knew fully that said Potter was doing so for the purpose of hindering, delaying and defrauding his creditors, and especially the plaintiffs; that at the time of said pretended conveyance there was an understanding and agreement between said Ralphsnnyder, defendant, and said Potter to the effect that at some time subsequent thereto, either when it might be thought proper by the parties or at some particular time specified in said contract, the said George M. Ralphsnnyder should reconvey the said property to said Potter; that subsequent to said conveyance, some time in 1888, said W. R. Potter departed this life intestate, and his widow, the defendant, Virginia Potter, qualified as his administratrix; that the said Virginia Potter was fully conversant and familiar with the said sale and conveyance, and the character of the whole transaction, and that she did then and does now know about the condition of the said sale, and that she knew all about the contract between her husband and the said George M. Ralphsnnyder, by which he was to reconvey said property to her said husband. And the plaintiffs call upon said Virginia Potter to answer what she may know about said transfer and sale; how much of said four hundred dollars was in fact paid; who paid the same, and where the money came from; what she may know about said contract or agreement between said G. M. Ralphsnnyder and her husband, whereby he should at some future time reconvey said property to her husband; whether said contract was in writing, and, if so, whether she had a copy thereof; and where said original contract is, if she has not got it; and, if said contract was not in writing, that she answer as to its character, effect, and conditions; also whether her co-defendant George M. Ralphsnnyder did not take charge of the notes and accounts of her said husband, and collect the same; what said notes

and accounts amounted to; how much the said George M. collected thereof, and paid over to her said husband; and if it was not true that said George M. collected accounts and notes due her said husband, and paid the same on part of the consideration mentioned in said deed from W. R. Potter to the said George M. Ralphsnyder. And the plaintiffs propound six interrogatories to said George M. Ralphsnyder, calling on him to disclose how much purchase money was actually paid to said Potter by him, and whether it is not true that at the time of said purchase he was merely a law student and did not have four hundred dollars, or any considerable sum of money with which to purchase property and pay for it; whether, if any money was paid on said purchase, it was not money of his brother I. C. Ralphsnyder, or some one else; whether it is not true that he, or some one for him, took an inventory of the goods directly before or shortly after said purchase, and if he did not tell any person what the value of said stock was, and what it amounted to by said inventory; and he is also called upon to produce a list of said articles of merchandise, and to state their value when he bought the same; also whether he took charge of the books and notes of said W. R. Potter, and proceeded to collect, and did collect, various amounts thereon, and if part of the money so collected was not paid on the debt, and became part of the consideration of six hundred dollars mentioned in said deed; and that he file a list of the notes and accounts which he took into his possession to collect for said Potter, or for any other purpose, what money he collected, and what he did with the same.

The defendant George M. Ralphsnyder occupies nearly twenty pages of the printed record in putting in issue the allegations of the bill, and in responding to the interrogatories propounded to him in said bill.

Virginia Potter, widow of said W. R. Potter, also answered the bill, admitting that she qualified as administratrix of her deceased husband. That she only received of the estate some personal property which she claimed as exempt against creditors, and alleging that she was no party to any of the alleged fraudulent transactions stated in plaintiff's bill. That

for want of information on the subject she can not answer the interrogatories propounded to her in said bill, except that she is aware that the books and accounts of the late Dr. Potter passed into the hands of I. C. Ralphsnyder, attorney at law. That this was all the personal property owned by said William R. Potter, except what was so held as exempt, which latter was less than two hundred dollars; and she claims her dower interest in the real and personal estate of said W. R. Potter.

J. Ami Martin, who is named as defendant, also answered said bill, admitting that on the first day of April, 1881, he sold and conveyed said lot of land to W. R. Potter for the sum of four hundred dollars, in payments of one hundred dollars each, payable in one, two, three and four years. That the first two of said notes had been paid, but the last two, which fell due on April 1, 1884 and 1885, respectively, have not been paid, but are entitled to two credits, one of sixty dollars or sixty five dollars, paid by George M. Ralphsnyder in the early part of 1888, and another of thirty three dollars and thirty nine cents paid the 24th of March, 1887, by I. C. Ralphsnyder, a brother of said George M. Ralphsnyder, assigning to respondent a note executed by one A. S. Pratt to said I. C. Ralphsnyder for said amount. That said notes were assigned by him to W. G. Brown, who held them for some time; and that respondent has taken said notes back, and exhibits them with his answer, and asks that the same, and the lien by which they are secured, may be enforced, and that said lien be paid from the sale of said lot.

Numerous depositions were taken in the cause, and on the 4th day of April, 1891, a *nunc pro tunc* order was entered, reciting that at the December term, 1890, the plaintiffs, upon the pleadings and evidence in the cause taken, suggested that evidence so taken disclosed that I. C. Ralphsnyder had an interest in the property conveyed to his brother, the defendant George M. Ralphsnyder; and thereupon said plaintiffs, by their attorney, moved the court for leave to file an amended bill, making the said I. C. Ralphsnyder a codefendant; which motion was resisted by said I. C. Ralphsnyder in person, and as attorney for his brother, and the motion was overruled,

and the court refused to allow the bill to be so amended, and the plaintiffs excepted. On the same day the cause was again heard upon the bill, exhibits, answers and depositions; and the court being of opinion, from the pleadings and proofs, that the conveyance of the storehouse and lot and stock of goods by William R. Potter to the defendant George M. Ralphsnyder, as set forth in the pleadings and evidence, was made by said W. R. Potter with intent to hinder, delay and defraud his creditors, and especially the plaintiffs, and that the defendant George M. Ralphsnyder had full knowledge of such fraudulent intent on the part of his grantor, it was therefore decreed that the deed set forth in plaintiffs' Exhibit B, filed with their bill, dated January 31, 1887, be decreed fraudulent and void, and set aside and held for nought, as to the plaintiffs' debt established in the pleadings and proofs against the estate of W. R. Potter, deceased; and that there was due to J. Ami Martin from the estate of William R. Potter, deceased, the sum of one hundred and eighty five dollars and fifty one cents, balance of purchase money, with interest from the date of said decree, which debt is secured by vendor's lien on said real estate; and it further appearing that there was due from the estate of William R. Potter, deceased, to the plaintiffs the sum of three hundred and sixty nine dollars and fifty five cents, with interest from the date of said decree, which debt is a lien on said real estate from the filing of the bill, it was ordered and decreed that the defendant Virginia Potter, as administratrix of the estate of William R. Potter, deceased, do pay to the plaintiffs the said sum of three hundred and sixty nine dollars and fifty five cents, with interest from the date of said decree; and as to the prayer of said Virginia Potter, widow, in her answer, for dower in said real and personal estate, the same was reserved, with all questions touching the same, for the future consideration and order of the court; and it was further decreed that unless the said Virginia Potter, as such administratrix, should within thirty days from the date pay to the plaintiffs, out of the estate of William R. Potter, deceased, in her hands to be administered, the sum of three hundred and sixty nine dollars and fifty five cents, with interest from date, together with

the costs of said suit, or unless some other person should pay said debt and costs for her, a special commissioner therein named should on some court day, at the front door of the court house of said county, make sale of said real estate upon the terms therein prescribed; and the sheriff of said county was directed at once to take charge and possession of the storeroom mentioned in said Exhibit B, and ascertain how much of said stock of goods remained in said storeroom, and list and appraise the same; and said special commissioner was also directed, in making the sale of said real estate, to also sell said stock of goods as a whole, allowing the defendant or his attorney to remove any goods, not belonging to the original stock, which were brought and put there by him since said purchase.

On the 21st day of July, 1891, a decree was entered in said cause, confirming the report of the special commissioner appointed to make sale of said storehouse and lot and stock of goods, which appear to have brought one thousand and ten dollars at said sale, three hundred and thirty six dollars and sixty six cents of which amount was paid down, and two single bills for a like amount, payable in one and two years, with interest, were executed to said commissioner for the residue; and said decree also directed the manner of disbursing said cash payment.

J. R. Greer, A. Laing and W. Cruickshank, doing business under the firm name of Greer & Laing, filed their petition in the cause, alleging that said W. R. Potter was largely indebted to them for goods and merchandise which he had purchased from them prior to the 21st day of March, 1884, and on said date said Potter executed his negotiable note to them for three hundred and nineteen dollars and twenty one cents, payable sixty days after date, at the National Bank of Kingwood, which note is exhibited with said petition; that no part of said note had been paid; and also making the same allegations in regard to the conveyance of said storehouse and stock of goods to George M. Ralphsnyder as were made in the bill filed by Richardson, Goodwin & Co., in their bill; reciting the fact that said deed had been set aside as voluntary, fraudulent and void, in said suit of Richardson, Goodwin & Co., and

their debt declared a lien thereon, and said house and lot, and so much of the stock of goods that remained, had been sold to pay plaintiffs' debt; and said petitioners allege that after the payment of said Richardson, Goodwin & Co.'s debt there will remain a considerable surplus fund from the proceeds of said sale, and they ask that they may be allowed to come in and be made parties plaintiff in said cause, and that all the proceedings in said cause may be taken and read as part of their petition; that said deed from W. R. Potter to George M. Ralphsnyder may be declared voluntary, fraudulent and void, and set aside as to petitioners' debt; and that any surplus remaining after the payment of the lien and charges decreed against her may be applied to the debt of petitioners.

George M. Ralphsnyder filed his answer, putting in issue the allegations of said petition, which answer was replied to generally; and on the 29th day of March, 1892, a decree was entered in said cause, ascertaining the amount of said petitioner's claim, holding said deed to George M. Ralphsnyder fraudulent and void as to said petitioner's debt, and directing that unless said debt be sooner paid by Virginia Potter, administratrix, or some one for her, said special commissioner apply any surplus in his hands towards the payment of said petitioners' debt; and from said decree rendered in the case of Richardson, Goodwin & Co. against George M. Ralphsnyder and others, on the 4th day of April, 1891, said George M. Ralphsnyder obtained this appeal assigning as the first error the action of the court in holding the deed from William R. Potter to George M. Ralphsnyder fraudulent and void as to the rights of the plaintiffs.

Now, this Court held in the case of *Lockhart v. Beckley*, 10 W. Va. 88 (9th point of syllabus) that "fraud is to be legally inferred from the facts and circumstances of the case, when those facts and circumstances are of such a character as to lead a reasonable man to the conclusion that the conveyance was made with the intent to hinder, delay, or defraud existing or future creditors." See, also, *Bartlett v. Cleavenger*, 35 W. Va. 720 (14 S. E. Rep. 273). Now, in considering the circumstances surrounding this transaction, it is proper to look,

first, at the pecuniary condition of William R. Potter at the time he attempted to convey his house and lot and stock of goods to George M. Ralphsnyder; and the evidence discloses that at the time he was indebted to two firms in the city of Wheeling in a sum greatly in excess of the consideration named in the deed which ostensibly transferred his house, store and stock of goods. Two days previously he had transferred to his attorney and legal advisor all of his accounts and notes, in consideration of past and future legal services, and to his mother and sister all of his interest in the home farm, which constituted his entire property, with the exception of his household goods. About the 1st of August he settled with the witness C. C. Craig, and fell in his debt sixty or seventy dollars. He told said witness that he had no money; that he had large accounts standing out, as much as five hundred dollars or six hundred dollars, and from one thousand dollars to one thousand two hundred dollars in goods; insisted on his buying goods saying that he had better take goods when he could get them; that he might not be in business very long. This conversation occurred a few days before said Potter sold out. What the real consideration of the transfer of the books, notes and accounts to I. C. Ralphsnyder was, does not appear. It lies concealed under the general description of "past and future legal services." This assignment or transfer of books and accounts appears by the testimony of I. C. Ralphsnyder to have been made on the 29th day of January, 1887, and on the 31st day of January, 1887, the deeds from said W. R. Potter to George M. Ralphsnyder for the storehouse and merchandise, and to his mother and sister for his interest in the home farm; and the inquiry suggests itself, at this point, why did W. R. Potter at this time suddenly conclude to part with all of his property, selling his home, his storehouse and store goods for less than half what it subsequently brought at public sale, and for less than one third of what the testimony shows it was really worth? He sells it to a young man, the brother of his attorney and legal adviser, who is accidentally in the town of Kingwood on a visit to his brother, but who is a resident of another county, where he lived on a farm with his father, who is assessed

with no property at his home, but who is stated to have been interested in a wheat crop, and had a horse and some cattle; who borrowed three hundred and ninety dollars of the four hundred dollars cash payment from his brother I. C. Ralphsnyder, who had the books, notes and accounts of W. R. Potter in his possession; who had no money to invest in speculation, but learned of this speculation from the confidential legal adviser of said Potter, as it can not be presumed that a mere visitor in the town would so soon learn that said Potter wanted to sell; and it is reasonable to suppose that his brother I. C., in their confidential talks, would not only advise him of the fact; but at the same time assist his client in finding a purchaser, although he had to furnish the money to that purchaser to enable him to make the purchase; and another fact shown by the deposition of said George M. Ralphsnyder is significant, and that is that said George M. took no inventory of said goods, either directly before or shortly after the purchase; he just took them upon the representation of said Potter, making what is called, in common parlance, a "lumping trade." This transaction was not accompanied with the usual deliberation practiced by men in such transactions. Again, George A. Walls, in detailing the circumstances of this transaction, says that four hundred dollars was paid to Dr. W. R. Potter in the store room of said Potter, and his recollection is that it was paid by the hands of I. C. Ralphsnyder. He did not count the money, but saw it passed to the hands of said Potter and understood that it was four hundred dollars. This was after dark, near eight o'clock in the evening. Said Walls also states that, after taking the acknowledgment of said deed, Mr. I. C. Ralphsnyder said that he would like to have the acknowledgment written out and the deed recorded. "We then came down to the office—I think all three of us came; I wouldn't be positive about that—and, after coming to the office, I said to Mr. Ralphsnyder that I would make a memorandum of the acknowledgment to said deed, and mark it, 'Filed for record;' but he said, 'No;' he would rather have the acknowledgment written out in full, and the deed recorded. I then told him, 'All right;' that I would write the acknowledgment of the

deed, and sign it, but that it was too late to record it that night." He also says the certificate was written out that night at the urgent request of Mr. I. C. Ralphsnyder, who said he wanted the matter entirely closed up, and that a mere memorandum would not be legal, he was afraid. Whether Mr. I. C. Ralphsnyder was acting in the interest of his client W. R. Potter, or his brother George M., when he was in the clerk's office, between eight and nine o'clock at night, urging the immediate recordation of said deed, does not appear; nor is it very material. He was there, and appears to have been apprehensive. The clerk testifies that such haste is unusual in indorsing the certificate of acknowledgment upon deeds, or in recording the same. What, then, was the cause of this haste? Could it have been that I. C. Ralphsnyder, who was the legal adviser of said Potter, and so well acquainted with his pecuniary condition and liabilities, was apprehensive of some attack from the creditors of said Potter, and wished to hinder, delay and defraud them by transferring all of his property beyond their reach? These however, are not all the circumstances which point in that direction. The witness H. H. Potter testifies as follows: "I could not say how long it was before the sale, but it was before the house was finished that he sold, and before he burned out, down on Price street. I happened in his store, and he and Mr. Frey, of Greer & Laing, were talking about some old bills, and Mr. Frey said he would see that they were straightened up, and took the number of some checks." After Mr. Frey went away, doc (meaning W. R. Potter) told him that they had not given him credit for payments he had made, and had him charged on the books with several hundred dollars more than he owed them, and that he intended straightening them out on them. After Mr. Frey was gone a day or two, said Potter called him over to his store, and showed him a receipt or two, and a statement from Greer & Laing on which there were no credits to correspond with the receipt. After Potter burnt out and moved into the new building, he (witness) went up there to see Mr. Frey, and he and the doctor were running over this account again, and, after Frey was gone, Dr. Potter told him that he never in-

tended to pay what Greer & Laing claimed off of him; that he did not owe them one half what they claimed; and that he would spend all he had before he would pay a debt twice. After the sale, said H. H. Potter also testifies to a conversation had with I. C. Ralphsnyder at the storehouse, in the presence of Dr. Potter, in which he told I. C. Ralphsnyder that if he had swindled Dr. Potter out of his building he could not beat witness out of what little he had. He replied that he had not done anything of the kind; that he had paid all that it was worth. He (witness) told him he did not think so, and he said there was nobody else that would give any more for it, and witness told him that he knew better. Dr. Potter was present and he said: "Why did not they do it, if they would?" Witness remarked that he did not think they had a proper chance, and he said he reckoned that they could have a chance yet if they wanted to pay more; and Mr. I. C. Ralphsnyder then said, if there was anybody that wanted to pay more, they could have the chance then to do it. Witness told him he would give him fifty dollars for his bargain right there, and he said witness could have it. Witness named the amount he understood he had paid. He said it was fifty dollars more than that. Witness told him he would go to the record, and see what it said; and he (Ralphsnyder) replied that there was a little difference between him and Dr. Potter before, that was not considered in the record, amounting to fifty dollars, or about that. Dr. Potter then said that was correct. Witness then said he would advance him fifty dollars on that yet. He said it was a trade, and witness so considered it. He said he wanted the cash right down. Witness told him he would pay him twenty five dollars and the rest as soon as the papers were made over, cash in hand. He said it was not necessary to take the twenty five dollars; that he would make the papers out at one o'clock. Witness told him he would meet him at the clerk's office. Witness got the money, and went to the clerk's office, and waited until two o'clock, but Ralphsnyder did not come. Witness also states that Dr. Potter told him that he had said I. C. Ralphsnyder employed as his attorney by the year.

Another circumstance is shown by the answer of J. Ami

Martin, who is the holder of the two notes for the one hundred dollars each, secured by vendor's lien on said lot. He says sixty dollars or sixty five dollars was paid by George M. Ralphsnyder in the early part of March, 1888, and a payment of thirty three dollars and thirty nine cents was made about the 24th of March, 1887, by said I. C. Ralphsnyder assigning to him a note on A. S. Pratt, executed to said I. C. Ralphsnyder for that amount. This is but another circumstance showing how and by whom said purchase money was paid.

Now, as to the fact developed in the testimony of H. H. Potter, of a false recital as to the considerations named in the deed from W. R. Potter to George M. Ralphsnyder, creating a discrepancy of fifty dollars; Bump on Fraudulent Conveyances (at page 40) says: "An instrument which misrepresents the transaction that it recites is evidence of a secret trust, and is calculated to mislead and deceive creditors. A false recital is therefore a badge of fraud, and the instrument in which it occurs must sustain a rigorous examination."

Another fact which strongly indicates a secret trust is disclosed in the testimony of I. C. Ralphsnyder, who states that after said transfer he paid over to W. R. Potter and wife one hundred dollars or one hundred and fifty dollars collected by him on store accounts placed in his hands by said Potter. Now, it appears by the testimony of I. C. Ralphsnyder that on the 29th day of January, 1887, all the books and accounts of said W. R. Potter had been transferred and assigned to said I. C. Ralphsnyder in consideration of past and future professional services, yet said I. C. Ralphsnyder testifies that said Potter told him he needed money, and assigned that as a reason for wanting him to collect these claims, one hundred dollars or a hundred and fifty dollars of which he states he paid over to him; and he says, further, that said Potter told him he intended to pay all of his debts; but how he was to pay any debt out of the accounts, etc., assigned to said I. C. Ralphsnyder for legal services, unless said Ralphsnyder secretly paid the money collected to him, no one can tell. That such was not his intention, however, is plainly apparent from the fact that he sold and conveyed his home, his storehouse and store goods to George M. Ralphsnyder for less than one

third of its value; that I. C. Ralphsnyder, his confidential legal adviser, not only found a purchaser of this property in the person of his impecunious brother, who was paying him a visit, but furnished him with nearly all of the money with which to make the purchase; and that the deed for same was hurried on to the record at nine o'clock at night, the clerk testifying that he wrote out the certificate of acknowledgment at the urgent request of I. C. Ralphsnyder, who said he wanted the matter entirely closed up, and that a memorandum would not be legal, he was afraid. The question naturally suggests itself, afraid of what? and why could not the deed as well have been recorded the next day? or the acknowledgment endorsed the next day? Another fact which tends to elucidate this conduct, and account for this haste, appears in the testimony of H. H. Potter, who says that said W. R. Potter told him before this sale that he never intended to pay what Greer & Laing claimed off of him; that he did not owe them one half they claimed, and that he would spend all he had before he would pay a debt twice; and, at the same time that he conveyed his home and storehouse and store goods, he conveyed his interest in his father's place (the home farm). Everything he had in the shape of property was apparently transferred to *bona fide* purchasers, yet I. C. Ralphsnyder, several days after the sale, in the presence of Dr. Potter, told H. H. Potter that he could have the property by paying one hundred dollars advance on the cost price, without consulting his brother George M. Ralphsnyder; and this fact, combined with the confidential relations existing between said I. C. Ralphsnyder and W. R. Potter, and his brother George M. Ralphsnyder, are very potent in convincing the unprejudiced mind that George M. Ralphsnyder was not only fully aware of the fraudulent intent of said W. R. Potter in attempting to transfer his property beyond the reach of his creditors, but that he allowed himself to be used by his brother I. C. Ralphsnyder as an instrument by which that object was sought to be effected. I. C. Ralphsnyder was a very active and efficient agent for his client. He not only found him a purchaser, but furnished the purchaser with the money to pay the cash payment and a part of the defer-

red payment. It is stated in evidence that W. R. Potter needed money to pay debts with, but, as to any debt ever having been paid by W. R. Potter to any one of his creditors with the four hundred dollars received as the proceeds of his house and lot and store, the record is silent. No inventory of the goods was taken at the time of the purchase, but George M. Ralphsnyder testifies that he had long since repaid to his brother I. C. Ralphsnyder the money he borrowed from him to make the purchase; and this statement is made on the 29th day of August, 1890; this suit was brought in October, 1889; and the conveyance was made in January, 1887—so that if this statement of said George M. be true, that he had long since paid his brother, if he paid out of the business, he must have been much more successful than said W. R. Potter was during the time he was conducting the business, and the evidence fails to show that said George M. Ralphsnyder had any other source from which to derive the money to pay back said money.

Now, in the case of *Reilly v. Barr*, 34 W. Va. 96 (11 S. E. Rep. 750) this Court held that “when it appears that an instrument conveying real estate is impeached as fraudulent by creditors of the grantor, if the evidence discloses the fact that said instrument is false in any material part, the burden of showing the transaction was fair lies upon the party who seeks to uphold it.” Now the consideration named in this deed was four hundred dollars, and yet H. H. Potter swears that I. C. Ralphsnyder told him, in the presence of W. R. Potter, when he was talking of buying the property, that the true consideration was four hundred and fifty dollars; and that there was a difference between Dr. Potter and him that was not considered in the record; so that, if this be true, there was another fifty dollars of purchase money not paid by George M. but by I. C. Ralphsnyder, and the deed is shown to be false in a very material part, and the burden of showing the transaction was fair is thrown upon said George M. Ralphsnyder.

Waite, in his work on Fraudulent Conveyances, says, quoting from Story, Judge: “Fraud is always a question of fact with reference to the intention of the grantor. Where

there is no fraud, there is no infirmity in the deed. Every case depends upon its circumstances, and is to be carefully scrutinized; but the vital question is always the good faith of the transaction. There is no other test. Fraud does not consist in mere intention, but in intention carried out by hurtful acts. Fraud or no fraud is generally a question of fact, to be determined by all the circumstances of the case.' Direct proof of positive fraud, in the various kinds of covinous alienations which we are to discuss, is not, as we shall presently see, generally attainable, nor is it vitally essential. The fraudulent conspirators will not be prompted to proclaim their unlawful intentions from the housetops, or to summon disinterested witnesses to their nefarious schemes. The transaction, like a crime, is generally consummated under cover of darkness, with the safeguard of secrecy thrown about it. Hence it must be judged of by all the surrounding circumstances of the case. The evidence is almost always circumstantial. Nevertheless, though circumstantial, it produces conviction in the mind often of more force than direct testimony." Among the badges of fraud enumerated by Waite in his work on Fraudulent Conveyances are the failure to take an account of stock, and a false admission of the receipt of purchase money, both of which are present in this instance.

The question as to whether George M. Ralphsnyder had notice of any fraudulent intent on the part of his grantor, W. R. Potter, is one which also may be determined by the surrounding circumstances. The testimony shows that for a week previous to the purchase of this property from W. R. Potter, he had been a visitor of his brother, and had been with him night and day. Two days before the deed was made, said Potter had transferred his books and accounts to I. C. Ralphsnyder, and it surely never would have occurred to George M. to purchase this property if I. C. Ralphsnyder had not told him of its value, and offered to loan him the money; and Mr. Wall says, in his testimony, that George M. was in the clerk's office when his brother I. C. was urging the immediate recordation of the deed; and the evidence clearly showing that said

W. R. Potter made this conveyance with fraudulent intent, and I. C. Ralphsnyder acting as legal adviser of said Potter and George M. (his brother) at the same time, the conclusion is irresistible that he explained the entire matter to said George M. before the purchase was made; and, although the parties went through the formality of paying over the four hundred dollars in the presence of a witness, yet the said Potter, having conceived the fraudulent intent of defrauding his creditors, could easily have handed the money back to I. C. Ralphsnyder, who Wall says handed him (Potter) the money, as the transaction between them in regard to the fifty dollars which was not included in the consideration named in the deed, clearly shows that their relations were very intimate and confidential. Taking the whole circumstances surrounding the transaction, then, my conclusion is that said George M. Ralphsnyder had full notice of the fraudulent intent of said W. R. Potter.

In the case of *Smith v. Yoke*, 27 W. Va. 639, this Court held that where a decree sought to be reversed is based upon depositions which are so conflicting, and of such doubtful and unsatisfactory character, that different minds and different judges might reasonably disagree as to the facts proved by them, or the proper conclusions to be deduced therefrom, the appellate court will decline to reverse the finding or decree of the chancellor, although the testimony may be such that the appellate court might have pronounced a different decree if it had acted upon the cause in the first instance. The same thing is held in the case of *Bartlett v. Cleavenger*, 35 W. Va. 720 (14 S. E. Rep. 273).

Applying the law, then, to the facts and circumstances shown in this case, my conclusion is that the court committed no error in decreeing that the deed from W. R. Potter to George M. Ralphsnyder was fraudulent and void as to the rights of the plaintiffs.

The next error assigned is in not ascertaining the personal estate of William R. Porter, and settling the administration accounts of his personal representative, before any sale of the land and goods in the cause described.

As to this assignment of error it appears by the answer

of Virginia Potter, widow, and administratrix of the estate of W. R. Potter, deceased, that the books and accounts which were assigned by W. R. Potter to L. C. Ralphsnyder were all the personal property owned by said W. R. Potter, except what was held as exempt, which was less than two hundred dollars; and she elects to take her dower in gross out of the property sold; and for that reason there was no necessity of assigning her dower, and there was no necessity of directing an account [see *Siceoney v. Refining Co.*, 30 W. Va. 443 (4 S. E. Rep. 431)] this being a suit to set aside a fraudulent conveyance, and the only personalty being the stock of goods claimed by the defendant George M. Ralphsnyder. See *Clark v. Figgins*, 31 W. Va. 156 (5 S. E. Rep. 643) where it is held that where an assignment of personal property is made in fraud of creditors, they or any of them may, in a court of equity, have the same set aside.

The creditor who first files his bill obtains thereby a priority, and is entitled to be first paid from the proceeds of the sale of the property, if there are no valid prior liens.

The deed, though ever so fraudulent as to existing creditors of the grantor, is valid and binding as between the parties to the fraud. See *Core v. Cunningham*, 27 W. Va. 210.

It is further assigned as error that the court decreed a sale of the property without giving the appellant George M. Ralphsnyder a day in which to relieve the same from sale. The plaintiffs, however, asserted no claim, and were entitled to no decree, for money against said George M. Ralphsnyder, and obtained no such decree against him. Their decree was against the estate of W. R. Potter, and his personal representative was allowed thirty days in which to pay said decree.

It is also assigned that it was error to read the evidence and pleading in the original cause in the petition proceeding of Greer & Laing against appellant. We find it stated, however, in *Sands' Suit in Equity* (page 688) that "creditors may come in by petition to a suit attacking a deed on the ground of fraud, and their priority will be determined by the date of filing their petition, unless they have other ground of priority," citing *Wallace's Adm'r v. Treacle*, 27 Gratt. 479.

See, also, 1 Bart. Ch. Prac. p. 340. A creditor may, under the practice, file his petition in a cause pending which has for its object the vacation of a fraudulent conveyance, and upon proper allegations be made a party to the suit; and the bill, exhibits, answers, depositions, orders and decrees, and all the proceedings in said cause, may, upon proper prayer, be read as part of his petition. See 3 Daniell, Ch. Pl. & Pr. p. 2142; 1 Daniell, Ch. Pl. & Pr. p. 874.

It is also claimed that it was error to overrule the demurrer of appellant to the petition of Greer & Laing, but as no reason for the demurrer is assigned in argument, and we see no objection to said petition, we must conclude that said demurrer was properly overruled.

This disposes of the errors assigned, and, for the reasons above stated, my conclusion is that there is no error in the decree complained of, and the same is affirmed, with costs and damages.

CHARLESTON.

BERRY v. WIEDMAN *et al.*

Submitted June 16, 1894.—Decided December 8, 1894.

1. HUSBAND AND WIFE—MARRIED WOMEN—RESULTING TRUST.

When a husband purchases property with his wife's money, and takes the deed in his own name, a resulting trust is raised in her favor; unless it is shown that she intended the money as a gift or loan to her husband, the establishment of which fact devolves on the husband, or those claiming under him.

2. HUSBAND AND WIFE—GIFT—LAPSE OF TIME.

Mere lapse of time is not sufficient to establish a gift on her part, in so far as his collateral heirs are concerned, if he has indulged her in the belief of ownership, and allowed her to improve the property with her separate estate.

JOSEPH MORELAND for appellants, cited Code, c. 86, s. 1; 16 W. Va. 686; 12 W. Va. 350; 16 W. Va. 108; Sto. Eq. Pl., § 218; Id. § 128; Id. § 141; 10 W. Va. 1; 15 W. Va. 666; 8 W.

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65	579

Va. 29; 19 W. Va. 179; Code 1868, c. 66; s. 1; Id. c. 166; p. 735; 25 W. Va. 816; 30 W. Va. 505; 1 Minn. Inst. 299; 14 W. Va. 338; 22 W. Va. 130; 16 Gratt. 275; 27 W. Va. 761; 20 W. Va. 571; 11 W. Va. 122; 13 W. Va. 29; 22 W. Va. 673; 23 W. Va. 499; 24 W. Va. 405; 27 W. Va. 206; 24 W. Va. 199; 29 W. Va. 441; 37 W. Va. 373; 32 W. Va. 203, 447; 37 W. Va. 396; 14 W. Va. 322; 14 W. Va. 338; 37 W. Va. 400; 13 W. Va. 67; 31 Penn. St. 454; 20 W. Va. 545; 13 W. Va. 68; 24 S. C. 273; 58 Am. Rep. 261 and note.

P. J. CROGAN for appellee.

- 1.—*Misnomer—Plea in abatement.*—Code, c. 125, s. 14, 15.
- 2.—*Parol proof of resulting trust.*—7 Leigh 577; 15 W. Va. 577; 2 Wash. R. P. 505.
- 3.—*When resulting trust arises.*—23 W. Va. 475; 22 W. Va. 355; 2 Pom. Eq. § 1043.
- 4.—*Wife's freehold lands prior to Code 1868.*—Min. Inst. 311; 30 W. Va. 507; 32 W. Va. 143.
- 5.—*Gift married women, prior to Code 1868. Husband trustee.*—1 W. Va. 205; 19 S. E. Rep. 382; 2 Sto. Eq. 1380.
- 6.—*Distribution of decedent's personal estate.*—Code, c. 78, s. 9.

DENT, JUDGE:

At July rules 1891, in the Clerk's office of the Circuit Court of Preston county, Helen A. Berry, plaintiff, filed her bill in chancery against Caroline Wiedman, S. A. Litman, Carl Litman and Mrs. A. J. Morris, heirs of her husband, Oliver Berry, deceased, to compel a conveyance to her of the legal title to a certain house and lot situated in Evansville, in said county. She alleges that the lot was originally purchased and paid for with money advanced to her by her father, but that the deed was made to her husband; that he always recognized the property as hers; and that she, with this understanding, during the years 1887, 1888, 1889, built thereon, with her separate funds, a house costing more than the property would sell for. After her husband's death, which occurred in the year 1891, his heirs set up claim to the ownership of the property, and thereupon she brought her suit to compel a conveyance of the legal title. On the 14th

day of September, 1891, the defendants appeared, and filed their joint answer, in which they denied the plaintiff's ownership of the property, or that she had invested any money in building the house thereon, but claimed that the whole property was bought and improved by Oliver Berry, deceased, out of his own funds. To this answer a general replication was entered, and the parties went to proof. On the first day of April, 1893, the Circuit Court entered a decree in favor of plaintiff, from which the defendants have appealed, and now here assign numerous errors:

First, want of proper parties; that the administrator of the personal estate of Oliver Berry should have been made a party. There were no debts, and no decree was sought against the personal estate, and therefore the administrator was not a necessary party.

As to the wife of A. J. Morris, she appears to have been properly summoned as Mrs. A. J. Morris, and she was before the court in her husband's name, and no objection to this was made in the court below; but the answer is filed for all the defendants, denying the plaintiff's equity, and this Court will not now permit the husband, who was not summoned in the case, to come in here, after a fair hearing, without objection, on the merits, and say that it was his, and not his wife's answer that was filed. Courts of equity will not permit themselves to be trifled with in this way. According to the rule laid down by this Court in the case of *Rader v. Neal*, 13 W. Va. 373, the husband was not a necessary party.

It does not affirmatively appear that Isaac Litman was a necessary party, as there is nothing in the case to show that he has any interest in the subject matter of the litigation, and unless the error affirmatively appear the decree will not be reversed.

The next four assignments of error relate to the merits. The proof on the part of the plaintiff clearly establishes the following to be the facts: That in January, 1866, the plaintiff and Oliver Berry, deceased, were married; that shortly prior to their marriage he had bargained for the property in controversy, but had not paid for the same, or obtained the deed therefor; that after the marriage, plaintiff's father, as

an advancement to her, furnished the money to pay for the property, and the deed was then taken in the name of the husband; that from time to time she received other funds from her father's estate, amounting in the aggregate to about eight thousand dollars; that in the years 1887, 1888 and 1889, with her separate funds, she erected a dwelling house on the property, at an expense of from one thousand dollars to one thousand five hundred dollars; that the lot on which this was erected was a small portion of the original property, worth about one hundred dollars, the residue having been sold; that the husband and wife had lived in peace together from the time of their marriage, in January, 1866, up until his death, March 18, 1891, over 25 years; and that he continually recognized the property in controversy to be the property of his wife, and had no estate at the time of his death.

To contradict this state of affairs, the defendants show that Oliver Berry received about one thousand dollars from his father's estate prior to his marriage with plaintiff; that he was a frugal and industrious man, and should have been, and was generally considered, worth a large sum of money, to wit, something like six thousand dollars, at the time of his death; and that he and his wife lived unhappily together, she being overbearing to him, and treating him cruelly.

Defendants' evidence is founded on mere matter of hearsay and supposition, and it seems to me that it clearly appears from this case, taken as a whole, that what little estate Oliver Berry had at the time of his marriage was expended in payments of debts, or used in the support of his family; that the fortune that he was supposed to have was really the money, and the increase thereof, received by his wife from her father's estate; and that, outside of her means thus received, he never was worth anything on his own account.

• All this he had a right, even prior to the Code of 1868, to recognize and treat as her property, when the same was not used in any manner to defeat the rights of his creditors. The decisions referred to by defendants' counsel in his exhaustive brief, were in cases where the rights of creditors were involved. A very different rule prevails where there is no

such controversy, but it is merely a litigation between the wife and the collateral heirs of the deceased husband. So far as the latter are concerned, the husband has the right to give his wife his property, his time, his labor and skill, and they have no reason to complain. They are only entitled to receive such estate as rightfully belonged to the husband, and was undisposed of at the time of his death. In morals, a wife who has lived with her husband for twenty five years has a far superior right, to collateral heirs, whose right of inheritance is merely a legal provision, through want of direct heirs, and contains within it no moral obligation. It is true, the defendants charge that they did not live happily together. The proof does not sustain this charge, and, if it did, such a fact would have little to do with determining the status of the property in controversy. The husband and wife sometimes did not perfectly agree, but this is not uncommon. On the contrary, it is rather the rule than the exception, because married people generally consider they have a proprietorship in each other; and therefore, if they do sometimes express their differences in language too severe or harsh, it is a matter entirely within and between themselves, and with which the public at large have nothing to do. Affections sometimes must be lacerated, before they will knit together properly and form two souls into one. Such difficulties are always magnified and exaggerated by repetition. The only question here is whether the plaintiff has shown a legal right to the property in controversy. "When a husband buys property with his wife's money, in his own name, there arises a resulting trust in her favor" (14 Am. & Eng. Enc. Law, p. 580, § 17; 1 Perry, Trusts, § 127) unless a different intention on her part is shown; and the burden of proof is on the husband to show she intended a gift to him, which is, however, *prima facie* established by proof of her knowledge and consent" (14 Am. & Eng. Enc. Law, *supra*). The fact that the deed of the lands was made to the husband, in the absence of proof that it was made so by the wife's direction, consent, or knowledge, is no evidence of such gift, and warrants no presumption against the wife's interest. *Wales v. Newbould*, 9 Mich. 45. In the case of

Pusey v. Gardner, 21 W. Va. 470, this Court held that "Courts will not enforce a resulting trust, after a great length of time, or laches on the part of the supposed *cestui que trust*. Lapse of time, when not a statutory bar, operates in equity as evidence of assent, acquiescence, or waiver. Approved in *Smith v. Turley*, 32 W. Va. (9 S. E. Rep. 46). Lapse of time, as an equitable bar, only raises a presumption, which may be rebutted. "Courts will not enforce a resulting trust after a great lapse of time, or laches on the part of the supposed *cestui que trust*, especially when it appears that the supposed nominal purchaser has occupied and enjoyed the estate. But if the trust is admitted, and there has been no adverse holding, lapse of time is no bar; and laches will not be allowed to avail as a defense, where fraud has been practiced on the *cestui* to keep her in ignorance of her rights until just before filing the bill. Any excuse for delay that takes hold of the conscience of the chancellor, and makes it inequitable to interpose the bar, is sufficient." 1 Perry Trusts § 141. And in the case of *Cranmer v. McSwords*, 24 W. Va. 595 (fifth point of syllabus) this Court propounded the law as follows: "While ignorance of law will not prevent the operation of a statute of limitations, the rule is different in equity—a court of conscience. In such court, moral as well as legal grounds may be considered, and a satisfactory moral excuse may be entertained, although it result from ignorance of law."

A long period of time had elapsed from the making of the deed until this suit was instituted, to wit, upwards of twenty five years—sufficient, ordinarily, to bar a proceeding of this kind. But during all this time the plaintiff and husband occupied the property as their common home; he, as far as the evidence discloses, always admitting, in her presence, her ownership. While, under a fiction of law, her possession was his, yet he had no adverse holding to her; and equity has little regard for mere fictions of law, but always looks at the facts and circumstances as they really exist. Even according to the evidence of defendants' witnesses, "She was lord of all she surveyed." "There was none her right to dispute," in so far as the property in controversy was concerned. Even if he did sometimes assert an ownership in the

property in her absence, he never did so in her presence, nor to any witnesses who would be likely to inform her of his claim; and such conduct on his part would only tend to show that he was attempting to deceive her as to the true legal condition of the property, lull her into a state of security, and perpetrate a fraud upon her. A wife's knowledge of law has always been recognized as limited, and therefore a court of equity vigilantly looks after her interests with tender solicitude. It is clearly established, beyond dispute or question, that her money built the dwelling house. Many of the receipts filed show on their face that they were taken by the husband in her name, and he admitted to several witnesses, not only that she built the property, but that it belonged to her. His admissions are proper evidence against, but not in favor of his heirs.

The Counsel insist that the administration account should have been settled, to ascertain whether he had not repaid her for the investments in the property. There is nothing of this kind alleged in the pleadings, and there is no evidence that she ever received one dollar of his estate. On the contrary the evidence tends to show that he was supported and cared for by her out of her separate property—the only source of income for many years prior to his death.

The legal evidence in this case vastly preponderates in favor of plaintiff, and establishes beyond dispute her moral and equitable right to the property in controversy; and therefore the Circuit Court committed no error in compelling a conveyance of the legal title to her by the defendants, and, on their failure, by a commissioner appointed for the purpose.

As to the question of costs, if no defense had been made, or no resistance of the plaintiff's rights undertaken, there might have been some justice in the claim that the defendants should not pay costs. But when parties make a rigid defense, and compel the expenditure of time, money, and the examination of witnesses, to secure their defeat, they ought not to expect to escape the payment of unnecessary costs occasioned by their own conduct. The decree is affirmed.

CHARLESTON.

BIRD v. STOUT *et al*,

Submitted June 12, 1894.—Decided December 8, 1894.

1. CONSTRUCTION OF WILL—CHARGE ON LAND.

A will gives several pecuniary legacies, and then gives a sum of money to three children, and then gives "the residue of my estate, real and personal," to a brother and three sisters, and appoints that brother its executor. Such will creates a charge on the land for the legacy to those children.

2. CONSTRUCTION OF WILL—RESIDUARY LEGATEE.

Where it is manifest that it was the design of a testator that legacies should be paid at all events, the implication is that the residuary devisee or legatee shall have only the remainder after satisfaction of the previous dispositions.

3. CONSTRUCTION OF WILL—ENFORCEMENT OF CHARGE ON LAND.

A will charges with a legacy land devised to a person, and he conveys it to a third person, who retains in his hands of the purchase money a sum to pay the legacy, and promises his grantor to pay it. Such grantor may maintain a bill in equity against his grantee, making the legatees parties, to compel the payment of such fund on the legacy, and to enforce the charge on the land.

4. AMENDED BILL.

An amended bill must not introduce another and different cause of suit from that of the original bill. But an amended bill is no departure from the original if it tend to promote a fair hearing of the matter of controversy on which the suit was originally really based, provided it do not introduce a new substantive cause of suit different from that stated, and different from that intended to be stated in the original bill. An amended bill can not be allowed containing statements inconsistent with the nature of the original bill or changing the cause of suit. By it allegations may be changed or modified, and others added, provided the identity of the cause of suit be preserved.

J. PHILIP CLIFFORD for appellant.

JOHN RUSSELL for appellee, cited 26 Gratt 207; 2 Sim. & Stu. 113; Cooper's Ch. Cas. 141; 1 Dan. Ch. 408; 3 Rand. 238; 9 Gratt. 1; 24 W. Va. 545; 2 Sto. Eq. Jur., § 1041.

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BRANNON, PRESIDENT:

Appeal taken by Noah Stout from a decree of the Circuit Court of Harrison county requiring him to pay certain money.

The first error assigned is that the court erred in overruling the defendant's demurrer to the original and amended bills.

Wesley M. Bird filed a bill in equity against Noah W. Stout as sole defendant, alleging that Bird had conveyed to Stout land at the price of three thousand, five hundred and five dollars and ninety five cents, of which three thousand dollars had been paid, and the balance was to have been paid afterwards, the deed retaining a lien for the deferred payment; that part of the land once belonged to James H. Bird, who by will devised it to said Wesley M. Bird and others, and directed said plaintiff, Wesley M. Bird, as his executor, to pay each of three infant children of his sister, Caroline S. Stewart, one hundred dollars on their severally reaching the age of twenty one years; that, as plaintiff apprehended that these legacies might be chargeable on the land, he proposed to pay them out of the money Stout was to pay him as the deferred payment for the land, the children not yet having reached twenty one years of age; that the three thousand dollars recited in the deed as paid had not in fact been paid when the deed was made to Stout, and Stout did not then pay it to plaintiff, but paid debts of plaintiff to sundry creditors; that in order to ascertain the present value of the legacies of the children at the date of the conveyance, a calculation was made, and Stout gave plaintiff his note for four hundred and fifty eight dollars and ninety five cents which was intended, with the debts to be paid by Stout, to leave enough of the purchase-money in the hands of Stout to pay the legacies as they would fall due; that Stout had in fact paid only three thousand two hundred and seventy seven dollars and ninety four cents of the price of the land, and still owed plaintiff the residue of the purchase-money, being two hundred and twenty eight dollars and one cent, with interest from October 1, 1879; that the children enti-

tled to said legacies were born on certain dates, showing one of them then of age, and Stout had never paid plaintiff or any one else the money so reserved for said children out of said purchase-money, and Stout pretended that as no provision was made in the deed for the legacies or sums to be paid the children, and he had paid said note of four hundred and fifty eight dollars and ninety five cents, he had paid for the land in full, and owed nothing more on it.

Let us say that the demurrer to this bill was improperly overruled, as the legatees were necessary, but absent parties. That defect was cured by an amended bill which brought them before the court. This amended bill repeated the allegations of the original substantially, alleging that the sum left in Stout's hands was there left for the reason that the legacies it was set apart to pay were a charge on the land under the will of James H. Bird, and was a trust fund for the payment of the legacies; that without regard to any lien on the land Stout should be compelled to account for the fund as trustee for the legatees.

The original bill prayed that the two hundred and twenty eight dollars and one cent be decreed to be paid to plaintiff, while the amended bill prayed that one third of the fund be paid to each of the legatees, and that the land be subjected to its payment.

A specification of grounds of demurrer filed to both bills claims that the original bill shows no equity. We have no brief on behalf of appellant Stout to support this contention. Is it intended to say that equity has no jurisdiction? This question occurred to me as one of doubt on first impression, but my doubt has drifted away on further reflection.

I do not think equity jurisdiction can be based on the theory of a lien reserved in the deed, for the deed admits a down payment of three thousand dollars, and retains a lien for the balance of the purchase-money, and the note given for that balance is stated in the original bill to have been paid.

It may be said that the aim of the amended bill to sustain jurisdiction in equity on the idea of a trust, and that this is a suit to make the trustee account, is untenable. I doubt

not but that by common-law the children entitled to the money left in Stout's hands could maintain an action of law for money had and received to their use, and under section 2, chapter 71, Code. See *Miller v. Lake*, 24 W. Va. 545. I have not deemed it necessary to decide whether Bird could maintain *assumpsit* for breach of undertaking to pay the legacies or money had and received, as I think equity jurisdiction can be clearly supported on other definite grounds, namely, that a charge rests on the land under James H. Bird's will, and that the plaintiff may file a bill on the principle of *quia timet* to compel Stout to pay the legacies to his exoneration.

The will of James H. Bird did create a charge on the land for these legacies. It first gave several other pecuniary legacies, and then the fourth and last clause is as follows: "I give to the children of my sister, Caroline S. Stewart, three hundred dollars, when they are of age, to be equally divided between them. The residue of my estate, real and personal, I wish equally divided between my brother, Wesley M. Bird and my three sisters Emily S. Bird, Sarah I. Patton and Rebecca A. Bird." Wesley M. Bird is appointed executor. There is a charge on the realty for three hundred dollars. The testator intended it should be paid at all events, as he declares he prefers the legacies over the gifts to Wesley M. Bird and his sisters by saying he gives them what they are to get only after payment of legacies. The use of the word "residue" plainly tells that the brother and sisters are to get only a remnant. And the fact that he does not, in the residuary clause, separate the personal and real estate, but blends them together, and gives his brother and three sisters the residue of both, shows that he had his mind on both as a fund to answer for the legacies. And besides the personalty is inadequate—a good reason why he should invoke both to discharge the legacies. And the fact that Wesley M. Bird is executor and a devisee also is important. The case of *Dowman v. Rust*, 6 Rand. (Va.) 587, is exactly in point. It holds that if the personalty be inadequate, or there be expressions in the will tending to show that the testator had the land in mind, a court will make legacies a charge on land, rather than they shall go unpaid. In that case, a tes-

tator, whose personalty was inadequate to pay legacies, having one brother, who would have been distributee, gave pecuniary legacies to two friends, and devised all the rest of her estate, real and personal, to that brother, and appointed him executor, and it was held that there was a charge on the realty for the pecuniary legacies. So, also, *Thomas v. Rector*, 23 W. Va. 26, sustains this holding by authorities cited in its opinion, and in its syllabus, which is that "where it is manifest from the whole will that it was the design of the testator that the legacies should be paid at all events, the implication is that the residuary devisee or legatee shall only have the remainder after satisfaction of the previous dispositions." See 2 Lomax Ex'rs, side p. 86.

Thus the land is charged, and Stout took it with the burden of that charge. Who will question the right of the legatees themselves to sue in equity to subject the land? They could do so for two reasons: First. Because they are owners of the charge; second, because they can sue at law for the deposit left in Stout's hands, or in equity. *Miller v. Lake*, 24 W. Va. 545. And if they could sue, why not Bird? Has he not an interest such as will enable him to enforce the charge, and call on Stout to perform his duty of payment? Bird was bound for payment, and his land also, and he conveys that land with the obligation resting on it, which obligation Stout promised to remove, and was trusted with a fund for its removal. Does not this interest *per se* enable him to enforce the payment outside of considerations based on the principles of *quia timet*? He may be deemed a creditor holding legal title to the debt for benefit of legatees. But he and his property are endangered by Stout's failure to pay. Stout agreed to indemnify him. A surety, under this principle, can go into equity to have the one primarily bound pay to his relief. So can one who has a guaranty of indemnity. *Call v. Scott*, 4 Call 402; *Bart. Ch. Prac.* 282; 2 Story Eq. Jur. §§ 849, 850.

The legatees, the parties entitled to receive the money, are before the court. Surely Bird has such interest as to bring all parties interested before the court to abide its decree.

Another ground of demurrer is that the amended bill departs from the original bill by setting up a different cause of suit. I shall not enlarge on this, supposing that the position is plainly untenable under the liberality allowed in amending bills. Even by the strictest rule of amendment, this amended bill is justified. It is based on the same ground of suit and same facts touching that ground. It only brings before the court the legatees, the owners of the money, thus only making an amendment as to parties necessary to a decree on the original bill, and without whom as parties it was defective. The original demanded the money for Bird, but the prayer of the amended bill is that it be paid to the proper parties, the legatees entitled to it; and the very facts stated in the original bill called in law for payment to the legatees. Surely here is no departure. In *Lamb v. Cecil*, 28 W. Va. 653, it is held that while, under pretense of amendment, you can not introduce an original and different cause of action or ground of relief, yet, if the cause of action and relief sought are substantially the same, it is immaterial that the form in which the claim is presented by amendment differs essentially from that in the original bill. Here there is not even that difference. In *Kuhn v. Brownfield*, 34 W. Va. 252 (12 S. E. Rep. 519) it was held even at law—and surely equity is as liberal—that such amendments of pleadings should be allowed as tend to promote fair trial of the matter of controversy on which the action was originally really based, provided the amendments do not introduce a new substantive cause of action different from that declared upon, and different from that which the party intended to declare upon when he brought his suit; that amendments can not be allowed which are inconsistent with the nature of the pleadings or change the cause of action. Allegations may be changed, others added, provided the identity of the cause of action is preserved. Surely, under these principles, this amended bill is fully vindicated.

Next it is assigned as error that the evidence does not justify the decree rendered against Stout for the payment of the money to the legatees. This depends on a simple question of fact; that is, whether, as part of the purchase-money

for the land sold by Bird to Stout, a fund was deposited in Stout's hands to pay the legacies in question. The Circuit Court has found against the defendant on this issue, and I see no ground to disagree with—certainly none to reverse—it. A witness (Peck) and the plaintiff say that a calculation was made about October 15, 1878, to ascertain the then present value of the legacies, and that Stout was present, and a sum was left in his hands to pay them. A witness (Knisely) was present, and corroborated Peck and Bird. Two other witnesses (Stewart and Cottrill) heard Stout admit in 1885, that there was money in his hands going to these children. Cottrill was guardian of one of the children and had a conversation with Stout, not casual, but specially touching it as in the interest of his ward, and his testimony has therefore the more weight. Stout, on the other side, is the only witness. Decree affirmed.

CHARLESTON.

HAWKER v. MOORE *et al.*

Submitted September 12, 1894.—Decided December 8, 1894.

1. CO-SURETIES—CONTRIBUTIONS.

Between co-sureties there should be proportionate equality of burden. One who has been compelled to pay the whole, the principal being insolvent, has a right in equity to compel his co-surety to pay his equitably equal part.

2. CO-SURETIES—SUBROGATION.

To this end he has a right to be subrogated to all the rights and remedies of the creditor, but not to the injury of any one who, by any rule of strict law, or in equity and good conscience, stands on higher ground, or for any reason has a better right. Such a one will not be displaced or his right disturbed. This is the essence of the doctrine of subrogation.

3. FRAUDULENT CONVEYANCE—SECRET TRUST—CO-SURETY.

A case in which a conveyance was set aside as made on a secret

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trust in fraud of the grantors creditors, and the land conveyed subjected to the lien of a judgment in favor by subrogation of a co-surety, who had been compelled to pay the whole, the principal debtor being insolvent.

J. PHILIP CLIFFORD, for appellant.

JOHN BASSELL, for appellee.

HOLT, JUDGE:

In this case the Circuit Court of Harrison county, by decree entered on the 7th day of January, 1893, set aside as fraudulent the deed made by appellant, Wilson Moore, on the first day of September, 1880, to Elam F. Piggatt, for the twenty five acres of land mentioned, and decreed the sale thereof to pay plaintiff's judgment, from which defendant Moore obtained this appeal.

The facts are as follows: On the 15th day of October, 1880, the Merchants' National Bank of West Virginia, at Clarksburg, was the holder of a promissory note given to the bank by James Hawker, the principal therein, and the defendant Wilson Moore, and plaintiff, Owen Hawker, as his sureties; and the bank on that day obtained a judgment thereon against the three parties named. James Hawker, the principal, was insolvent, and plaintiff, Owen Hawker, was compelled to satisfy and pay the judgment.

Therefore plaintiff was entitled to contribution from his co-surety, defendant Moore, of one-half the amount of the judgment thus paid, and to that extent to be substituted to the judgment lien of the bank against his real estate.

Where one has been compelled to pay the debt of another, equity, as far as it can be done without just ground of complaint on the part of others, substitutes him to all the rights and remedies of the creditor against such debtor. This doctrine of subrogation has been applied freely in this state, and to its full extent, upon the general principles of equity, without the aid of any statute; and, having taken this correct view in the beginning, there has so far never been any need of any statute to correct any mis-step in improper restraint of its application, upon the supposition that a debt once paid must thereafter be treated as non-existent under all circumstances, and to all intents and for all purposes.

The doctrine, as it has been expounded and applied in our courts, has nothing of form, nothing of technicality about it; and he who in administering it, would stick in the letter, forgets the end of its creation, and perverts the spirit which gave it birth. It is the creature of equity, and real essential justice is its object. *Enders v. Brune* (1826) 4 Rand. (Va.) 438, 447; *McNiel v. Miller* (1887) 29 W. Va. 480 (2 S. E. Rep. 335); *Robinson v. Sherman* (1845) 2 Gratt. 178; 2 Bart. Suit in Eq. 1051. The doctrine is eminently calculated to do exact justice between persons who are bound for the performance of the same duty or obligation, and is one therefore, which is much encouraged and protected. "Equality is equity" is on this branch its maxim. It springs naturally out of the two equities of contribution and exoneration, and is in fact one of the means by which those equities are enforced. Bisp. Pr. Eq. (4th Ed.) § 335; *Dering v. Earl of Winchelsea*, 1 Cox. 318; *Pendlebury v. Walker*, 4 Younge & C. Exch. 441; *Steel v. Dixon*, 17 Ch. Div. 825; Brett. Lead. Cas. in Mod. Eq. (2d Ed.) 285, notes. See *Ferguson v. Gibson*, L. R. 14 Eq. 379; *Forbes v. Jackson*, 19 Ch. Div. 615, under the mercantile law amendment, Act 19 and 20 Vict. c. 97, § 5; 2 Beach Mod. Eq. Jur. § 809. Here the plaintiff has paid off the judgment, and asks the court to give him the benefit of the creditor's lien. Who can object to this? Who is injured by it? Not the bank, for they have received their debt from the plaintiff, and justice binds them to give the plaintiff their vantage ground. Not the principal debtor, for he is insolvent, and has no interest in the matter. Not the co-surety for it is by his fault that the plaintiff had to bear, in the first instance, the whole burden. If he had paid his half, and equality is equity, there would have been no occasion to ask the court to compel him to pay; and it does not lie with him to say that the plaintiff shall not occupy a vantage ground that enables him, by process of law, to enforce the performance of his duty. The other creditors can not complain, for the debt has in truth not been paid, because not paid by the one ultimately bound, but by others, who became his unwilling creditors in due course of law. But if there should be any one who, by any rule of strict law, or in equity and good conscience, stands

on higher ground, or for any reason has a better right, he will not be displaced, or his right disturbed; for that is the essence of the doctrine. See *Pott v. Nathans* (1841) 1 Watts & S. 155; *Eddy v. Traver* (1837) 6 Paige 521; *Gross v. Davis*, 87 Tenn. 226 (11 S. W. Rep. 92) and 10 Am. St. R. 635, notes; *Sheld. Subr.* (2d Ed.) § 137; *Id.* p. 209, § 140; 24 Am. & Eng. Enc. Law, p. 189; *Thomas v. Stewart* (1888) 117 Ind. 50 (18 N. E. Rep. 505); *Crumlish's Adm'r v. Improvement Co.*, 38 W. Va. 390 (18 S. E. Rep. 456) and 23 L. R. A. 120, note 7; *Dugger v. Wright* (1888) 51 Ark. 232 (11 S. W. Rep. 213.)

It would answer no useful purpose to take up the testimony and show that it justifies the decree complained of. The fair conclusion to be drawn is that the deed of September 1, 1880, from defendant Moore to E. F. Piggatt, conveying the tract of land of twenty five acres in the bill and proceedings mentioned, was made by Moore to hinder and delay his creditors; and that Piggatt took it, was holding it for him, on some sort of secret trust, the full terms of which do not appear. But Moore continued to occupy and use the land as his own, as he had always done, without the payment of any rent; and after E. F. Piggatt's death this tract of twenty five acres was, by reason thereof, treated as not belonging to his estate, and was omitted when partition came to be made of his lands among his heirs.

Therefore the decree complained of is affirmed.



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CHARLESTON.

LAWSON, COMMISSIONER OF SCHOOL LANDS v. HART, *et al.*

Submitted September 12, 1894.—Decided December 8, 1894.

SCHOOL LANDS—PARTIES—APPEAL.

The commissioner of School lands is neither a necessary nor proper party to a chancery suit brought in the name of the State

of West Virginia, under section 6, chapter 24, Acts 1893, and therefore he is not entitled to appeal from the decrees of the Circuit Court in such suit.

L. C. LAWSON in *pro. per.*, cited Const. Art. XIII, s. 5; Acts 1872-73, c. 134, ss. 11, 12, 13; Acts 1882, c. 95, ss. 10, 11, 13, 14; Acts 1887, c. 17, s. 14; Acts 1889-90, c. 12; Acts 1891, c. 94, ss. 13, 16, 17; Acts 1893, c. 24, ss. 12, 13, 16; Code, 1886, c. 31, s. 34; Id. c. 105, s. 5; Code, c. 31, s. 39; Id. c. 132, s. 3; 11 Gratt. 55-72; 24 W. Va. 561; 29 W. Va. 633; 38 W. Va. 681, 683.

JOHN BASSELL and M. M. THOMPSON for appellees, cited Acts, 1893, c. 24, ss. 6, 7, 12, 13, 16, 20.

DENT, JUDGE:

On the 21st day of January, 1893, the Circuit Court of Harrison county directed a suit in chancery to be brought and prosecuted by and in the name of the State of West Virginia in accordance with the provision of section 5, chapter 105, Code, to sell, among others, a certain tract of land known as the Browns Mills tract or property, situated in said county.

C. H. Odbert and Thomas L. Ford, as persons claiming ownership of or interest in said land, were made parties defendant to the bill when filed.

Defendant Odbert answered said bill, setting up that he formerly owned said land, and sold it to defendant Ford, but had never made a deed therefor, for the reason that a large part of the purchase-money, to wit, the sum of more than seven hundred dollars remained unpaid; that he was not aware of the forfeiture of said land; and prayed that he might be either permitted to redeem the same, or, if sold, his lien for purchase-money might be preserved and protected.

Thomas L. Ford also filed his petition and answer in said suit, in which he virtually admitted the facts set out in the answer of said Odbert, but attempted to shift the blame of the forfeiture of said land from himself to said Odbert, and prayed to be allowed to redeem the same. Both of said

answers were in the nature of cross bills, and should have been so treated.

The court, for some reason, wholly disregarding the petition to redeem contained in each of said answers, on the coming in of the report of the commissioner in chancery to whom the cause had been referred, directed a sale of said land to pay—First, the costs of suit and expenses of sale; second, fifty nine dollars and thirteen cents taxes and interest due thereon; third, the vendor's lien of C. H. Odbert for unpaid purchase-money due from Thomas L. Ford, amounting to eight hundred and twenty eight dollars and seventy one cents, and the balance, if any, to said Ford.

And on the 8th day of February, 1894, the commissioner having reported a sale of said land at the price one thousand two hundred and seventy dollars, the court, by its decree, distributed the proceeds as follows: First. One half of the costs of the suit, including the half of a special fee of twenty five dollars, and forty one dollars and eighty seven cents commission, to the commissioner; also five dollars for making deed to purchaser. Second. Fifty nine dollars and thirteen cents taxes to the state. Third. Eight hundred and twenty eight dollars and seventy one cents with interest to C. H. Odbert. Fourth. The residue to Thomas L. Ford.

The commissioner, Lewis C. Lawson, not being satisfied with this decree, appeals to this Court for himself, and, as he alleges in his petition, for the state of West Virginia. The errors assigned and relied on in his argument are, first, that he was not ordered to pay the surplus over and above the taxes, interest, and costs into the state treasury for the benefit of the school fund; second, that he was not allowed commission on the sale at the maximum fixed by law, being ten *per centum*.

Under the provisions of section 5, chapter 95, Acts 1882, and section 3, chapter 134, Acts 1872-73, the commissioner of school lands was directed to file his petition in the Circuit Court of the county in which such lands were situated for a sale of such lands. This Court, in the case of *McClure v. Maitland*, 24 W. Va. 561, held that such proceedings were in no manner to be regarded a civil suit, but merely *ex parte* pro-

ceedings, adopted by the legislature for the sale of the lands belonging to the state; that they were administrative in their nature, and properly belonged to the legislative branch of the government, and not to the judicial; and, so far as the Circuit Court was called upon to act in such proceedings, it acted as the agent of the legislature, and therefore its orders entered in furtherance thereof were nonjudicial, and could not be reviewed by appeal or writ of error in this Court. *Auril v. Jaeger*, 24 W. Va. 583, was to the same effect. This doctrine was reviewed and approved in the later case of *McClure v. Maupeture*, 29 W. Va. 633 (2 S. E. Rep. 761).

To avoid the effect of these decisions, if possible, the legislature provided, in section 5, chapter 94, Acts 1891, and section 5, chapter 105, Code, that "a suit in chancery should be brought and prosecuted by and in the name of the state of West Virginia," in lieu of the old provision by petition in the name of the commissioner of school lands. Under chapter 105 of the Code, this suit was commenced, but it was carried on to final decree under the provisions of chapter 24, Acts 1893, similar, so far as the remedy is concerned, in all respects, to the former law. In section 7, chapter 24, Acts 1893, it is provided: "All suits brought and prosecuted under the provisions of this chapter shall be commenced as provided in chapter 124 of the Code, and proceeded in, heard and determined in the samemanner, and in all respects as other suits in chancery are brought, prosecuted and proceeded in, and shall be subject to the same rules of chancery practice as other suits in chancery in the state courts of this state, except as herein otherwise provided." And in section 18: "In every such suit brought under the provisions of this chapter, the court shall have full jurisdiction, power and authority to hear, try and determine all questions of title, possession and boundary which may arise therein, as well as any and all conflicting claims whatever to the real estate in question, arising therein." And in section 20: "Every final decree entered in any such suit shall be a bar to the claim of every person to the real estate, or any part of it, or any lien thereon, or to the proceeds thereof, who has

failed to appear and present his claim thereto as is provided in the sixth section of this chapter, except as to the excess of the proceeds of the sale thereof as provided in section sixteen of this chapter." Section 16 provides how the owner, his heirs, personal representatives, or assignees, or any lien-creditor, may recover the excess referred to in the twentieth section, which undoubtedly means the excess of the proceeds not before disposed of by the court. Section 10 provides that the Circuit Court may decree a sale of such lands as are subject to sale for the benefit of the school fund. Section 13 makes provision for the disbursement of the proceeds of lands which have been sold for the benefit of the school fund. By these provisions the Circuit Court is given complete equitable jurisdiction of the land in controversy, and is required to determine what lands can be sold for the benefit of the school fund.

By the constitution and statutory law, owners and those holding liens on the forfeited lands have reserved to them the right to the excess over and above the taxes, interest, and costs. If such lienors or owners appear in the chancery suit brought to sell such lands before a sale thereof, and establish their claims, the right of the school fund to participate in the proceeds of a sale in so far as they are in excess of the taxes is completely ousted, and there can no longer be a sale of such land for the benefit of the school fund alone. The sale, when ordered in the court, must be made, not for the benefit of the school fund alone, but for the taxes due thereon, liens established, and the residue to the person who has shown himself to be the lawful owner of the property.

Such is the manner in which the court proceeded and determined this case. It settled all rights and claims with regard to the property in controversy, and then proceeded to sell it in accordance with the prayer of the bill and the answers filed, except that the result of its determination was to exclude the school fund from any benefit in the proceeds of the sale in excess of the taxes. This was obviously in direct accord with the intention of the legislature in providing for a chancery proceeding in such cases. The

legislature would do no such foolish thing or require the Circuit Court, acting as a court of equity, to do such a foolish thing, as to ascertain who were the lienors and owners of the property, and entitled to the fund in controversy, in control of the court, and then say to them: "The fund is yours. Here it is. You may have it, but the court will just pay it into the state treasury, and you take this order to the auditor, and he will give you an order on the treasurer for it." Such circumlocution is not in accordance with the rules and proceedings of a court of chancery, and never was intended by the legislature.

Therefore the court committed no error in ordering the funds paid directly to the parties entitled to receive the same.

The land not being sold for the benefit of the school fund alone, the state of West Virginia, having received the full amount of taxes and interest due, has no interest in this appeal, and is therefore improperly made a party thereto.

Only parties prejudiced by the decree complained of can appeal therefrom. It is plain from the record and petition that, while the state is nominally a party, this appeal is on behalf of and in the name of Lewis C. Lawson, commissioner of school lands, and, as such, appointed commissioner of sale in this suit. His complaint is that the Circuit Court has not allowed him full commissions on the proceeds of sale as fixed by law. The amount controverted is too small to give this Court jurisdiction; hence the other matter is seized upon as a pretext for that purpose. He is not a party to the suit, either necessary or proper, but is a mere appointee of the Circuit Court, acting as its commissioner to carry out its decrees. If he does not want to obey them, he can resign, and the court can appoint another commissioner in his place.

If a court does not allow a commissioner his commission on sales as the law directs, this does not make him such party to the suit as will allow him to appeal from the court's decrees, but he must seek some other remedy to secure his commissions. He is merely the agent of the court so far as such suit is concerned.

For the foregoing reasons, the appeal in this case is dismissed as improvidently awarded.

CHARLESTON.

PHILLIPS v. MINEAR.

Submitted September 14, 1894.—Decided December 8, 1894.

1. TAX SALE—SHERIFF—COLLECTOR.

Section 9 of chapter 31 of the Code reads as follows: "No sheriff, deputy sheriff, collector or other officer who shall return any real estate as delinquent for the nonpayment of the taxes thereon, or who shall receive a list thereof under the provisions of the fourth section of this chapter, or who shall sell by himself, his deputy or agent, or who shall be the deputy of any officer making such sale, shall directly or indirectly purchase any real estate so sold, or be in any way directly or indirectly interested with any other person in such purchase. Every person violating this section shall forfeit one hundred dollars for each offense, and the sale shall be absolutely void, and the title to the real estate sold shall remain in the person in whose name the same is sold." *Held*, such fact making void such sale may be shown by any natural, common-sense implication fairly arising on the record according to the principles of evidence and ordinary means and methods of proof.

2. TAX SALE—AFFIDAVIT.

Where a sheriff who sells land for nonpayment of taxes under chapter 31 of the Code, appends to the list of sales not the affidavit required by law according to the form prescribed by section 13 of chapter 31, but, instead of saying in such affidavit, "I am not now, nor have I at any time been, directly or indirectly interested in the purchase of any of said real estate," substitutes therefor the phrase, "I am not directly or indirectly interested in the purchase of any of said land," and there being no other evidence of any kind on the point. *Held*, such case is properly held to be void under section 9 of chapter 31.

3. TAX SALE—CURATIVE ACT.

It is not the object or effect of the curative section 25 of chapter 31 to impair or in any way or to any degree affect section 9 of chapter 31, or to prescribe that its violation may not be shown by implication.

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56	492

A. B. PEARSONS for appellant, cited Acts 1882, c. 103 s. 25; Code, c. 31, s. 25; 34 W. Va. 207; 35 W. Va. 133, 134, 135; 36 W. Va. 613.

LIPSCOMB & LIPSCOMB for appellee, cited Code, p. 211, s. 13; Acts 1872-3, c. 117, s. 18; 15 S. E. Rep. 223; 19 W. Va. 150; 34 W. Va. 207-14.

HOLT, JUDGE:

The plaintiff, James Phillips, brought this suit in equity in the Circuit Court of Tucker county on the 23d day of January, 1891, against D. S. Minear, to set aside a tax deed made to said Minear on the 27th day of December, 1890, by C. W. Minear, clerk of the County Court of Tucker county, conveying a tract of one hundred and fourteen acres and one of thirty acres, recited as sold by A. H. Bonifield, as sheriff of said county, in the month of —, 1889, as charged with taxes in the name of James B. Phillips, and returned delinquent for the years 1887 and 1888, and bought by said defendant, David S. Minear.

The Circuit Court, by decree entered on the 13th day of March, 1893, set aside the tax deed, from which this appeal was taken.

The first question presented by this record is, does it appear by any natural and fair implication therefrom, that the sheriff who made the sale was at any time directly or indirectly interested in such purchase? If so, the law declares that the sale shall be absolutely void, and the title to the real estate sold shall remain in the person in whose name the same was sold. See section 9, chapter 31, Code 1891, under which this sale took place.

The evidence which goes to establish such interest is as follows: The thirteenth section (chapter 31) prescribed that there should be appended to such list an affidavit as follows:

"I, A. B., sheriff (or collector or deputy for C. D., sheriff or collector) of the county of —, do swear that the above list contains a true account of all the real estate within my county which has been sold by me, as well as a list of all the

real estate redeemed, and the names of the persons who redeemed the same during the present year, for the nonpayment of taxes thereon for the year —, and that I am not now, nor have I at any time been, directly or indirectly interested in the purchase of any of said real estate, so help me God."

Instead of that, the sheriff appended the following oath, taken on the 22d day of November, 1889:

"I, A. H. Bonnifield, sheriff of the county of Tucker, do swear that the above list contains a true account of all the real estate within my county, which has been sold by me to individuals during the present year for the nonpayment of taxes thereon for the years 1887 and 1888, and that I am not directly or indirectly interested in the purchase of any of said real estate. So help me God.

A. H. BONNIFIELD, Sheriff.

"Sworn and subscribed to before me this 22d day of November, 1889.

"ABE BONNIFIELD, Clerk County Court."

The legislature, with commendable wisdom, and for obvious reasons, enacted that the sheriff who made the sale should not be at any time, neither at the time when the affidavit is made nor at any prior time, in any way directly or indirectly interested in the purchase of said real estate; and it intended to secure the evidence of such want of interest on the part of the officer making the sale by requiring him to take and sign a written oath to that effect as lasting evidence, to be appended to the list of sales.

The former law had not required the affidavit to state the want of interest with such separate distinctness as to the time of interest, but the legislature, moved perhaps by some actual or supposed or apprehended evasion of the law in that regard, by chapter 5, p. 8, of the Acts of 1887, amended and re-enacted section 13, chapter 31, of the Code, so as to make it read as we now find it in section 13, chapter 31, of the Code (Ed. 1887, and Ed. 1891) "that I am not now, nor have I at any time been, directly or indirectly interested in the purchase of any of said real estate," and made no other change

in the section than the one here involved; so that it can hardly be said that the deliberate and only amendment made in a form of so important an oath was made for no purpose, and has no meaning, and that the old oath is, in effect, just as good.

But it may be said—and no doubt could be truly said—that the high character of the officer in this instance repels such inference of interest; but the change in the law was made not for particular instances, but for a general rule of conduct framed alike for all.

It will hardly be said that the officer did not, as matter of fact, know the law, or that it is hard to find, or to read and understood when found, or to put it in form when read and understood, for by turning to section 13 of chapter 31 of the Code of 1887—the law under which the sale was made—the form is given, and all such excuses thereby barred. It is a mistake to suppose that section 9 and section 13 are merely intended to make a purchase invalid which would, without such statutory inhibition, be lawful and valid. On general principles of public policy such a sale would be held void without any statute against it. Cooley, Tax'n 492. Public policy does not permit official integrity to be subjected to such conflict between duty and interest (see Black, Tax Titles, 2d Ed., § 297); and, if he can not buy directly, for a still stronger reason he should not be permitted to be indirectly interested in the purchase by or in the name of another; and this part of the affidavit is intended to bring home to the officer, impress it upon his conscience, and put him under the stress of an oath, sworn to and subscribed and filed as a part of the permanent record of his proceedings, that he can not purge himself of such a fault by transferring his interest to another, before he comes to make the affidavit; is intended to remind the officer that this law does not tolerate any such shift or device, and to give such express sanction to the honesty of the sale, and furnish at least *prima facie* evidence that no such shifting of interest between-times has been resorted to. And these provisions are in this state, and very generally, held to be mandatory, and indispensable to the validity of the sale. See *Simpson*

v. *Edmiston*, 23 W. Va. 675; Black Tax Titles, §§ 303, 306. Such was the main, if not the sole purpose of the amendment of section 13, chapter 31, made by the act of February 5, 1887 (see Acts 1887, p. 8).

The Circuit Court in holding this tax deed invalid was, in my opinion, clearly right, and was simply following and making effectual the behest of the lawmaker (see section 9, chapter 31) which declares with emphasis such a sale to be absolutely void; and taking as sufficient *prima facie* evidence of such interest, a common sense implication contained in and spread upon defendant's own record of title, in this case un rebutted, uncontradicted, in fact the only evidence in the case on that point; and upon a matter so vital as to be a necessary condition to the validity of the sale, with a plain mandatory form spread out before the officer on pages 212, 213, of the law (the law he was going by—chapter 31, Code, 1887) the only authority he had to sell at all, to bisect the oath required, putting in that on the 22d day of November, 1889, when the oath was taken, he was not directly or indirectly interested in the purchase of any of said real estate, but leaving out the most important part—that he was not indirectly interested in such purchase on the 12th day of November, 1889, when the sale was made—gives rise to a natural, material implication under such circumstances, which can not be overlooked or passed by wherever the common-law principles of evidence come into play. And the curative section 25 of the same chapter neither takes away nor attempts to take away such implication, but leaves section 9 in full force, rendering such interest on the day of sale enough of itself to make the sale absolutely void, with such fact to be made out *prima facie*, or otherwise, by the ordinary principles of evidence and common-law means and methods of proof that are used and applied by courts of equity. See *Hays v. Heatherly*, 36 W. Va. 613 (15 S. E. Rep. 223); *Jackson v. Kittle*, 34 W. Va. 207 (12 S. E. Rep. 484); *Barter v. Wade*, 39 W. Va. 281 (19 S. E. Rep. 404).

There is evidence in the case tending to show that within the time given by law for the owner to redeem—that is to say, within one year from the sale (section 15, chapter 31)—

there was an attempted tender of the purchase-money, as shown as to amount by the purchaser's official receipt (see section 10, chapter 31). The agent of plaintiff who lived on the land, who was to keep the taxes paid, went to the purchaser, told him he lived on the lands of plaintiff, James Phillips, and was authorized to pay all taxes in Tucker county for him, and asked defendant if he had bought for taxes any of the plaintiff's lands in that county. Defendant said he had bought none of James Phillips' lands for taxes; that he had no claims against any lands of James Phillips for taxes. Witness put his hand in his pocket to pay all taxes that there were on two tracts owned by Phillips, one of one hundred and fourteen acres and one of thirty acres (the lands in controversy). Defendant, Minear, said he had not bought said lands for taxes, and had no claim against it. "We talked a little along about it, and I remarked that I was to look carefully after Phillips' taxes, and, if Minear had bought said land, that I was ready to redeem it for James Phillips, and that I had the money there to do it; but Minear said that he had not bought the James Phillips land for taxes." The record shows that these two tracts were charged on the land books and sold in the name of James B. Phillips. He is corroborated in the main by his brother, who swears he was present, and by a third witness, who saw them together, talking about something, at the time and place mentioned.

Defendant, David S. Minear, examined as a witness on his own behalf, flatly denies this; says that neither such conversation, nor any one like it, ever took place. There is an attempt to impeach the general character for truth of these two witnesses for plaintiff, which certainly fails as to one. As to the first witness for plaintiff, five witnesses are introduced who testify that they are acquainted with his general character for truth, and that it is not good. On the other hand defendant introduces ten witnesses who testify that they are acquainted with his general character for truth, and that it is good.

Without going into details, it is enough to say that from the facts not contradicted, and from all the circumstances

of the case and their inherent probabilities, I am inclined to the opinion that no legal tender was made or dispensed with.

Several other defects are relied on. First. The land was charged on the land books and sold in the name of James B. Phillips. Second. The caption to the list of sales prescribed by the statute is not followed, but it reads, "List of real estate within the county of Tucker sold within the month of Tucker, 1889, for the nonpayment of taxes thereon for the years 1887 and 1888, and purchased by individuals." Third. It will be noticed that, besides the mistake of repeating the name of the county where the name of the month of the sale ought to have been inserted, omitting the month from the caption altogether, it does not comply with the form prescribed by law in other respects. See Code, 1887, c. 31, s. 12. Fourth. So, also, it will be seen that the affidavit of the officer to be appended as required by the form given in section 13, chapter 31, reads: "A true account of all the real estate within my county which has been sold by me, as well as a list of all the real estate redeemed," *etc.* In the affidavit here brought in question the latter clause is wholly omitted. The forms given in the Code are so short, plain and simple that it is hard to explain their frequent non-observance; but the curative section 25 of the same chapter 31 is so broad and comprehensive that I should be inclined to think it cured these irregularities in the list of sales mentioned above.

But for the reason already given I am of opinion there is no error in the decree complained of, and that it should be affirmed.

CHARLESTON.

STEWART *et al.* v. STEWART.

Submitted June 12, 1894.—Decided December 8, 1894.

40	65
47	289
40	65
56	64
566	567

40	65
61	551

1. EQUITY PRACTICE—LOST PAPERS—WAIVER.

Where the original papers in a cause have been lost, they may be supplied as provided in section 14 of chapter 130 of the Code; and in a chancery cause, where the lost bill is thus supplied, and the defendant appears and files his answer thereto, he thereby waives any objection to the manner in which the bill was supplied, or to the authenticity of the copy thus supplied.

40	65
64	518

2. EQUITY PRACTICE—CONSENT DECREE—CLERICAL ERROR.

After the term at which a consent decree is entered it can not be set aside, modified, or altered without the consent of the parties, except only to correct a clerical error, which is a mistake made by the clerk in entering such consent decree, and it may be corrected by the original draft of the decree furnished the clerk by the court; or it may be a miscalculation or mistake in some arithmetical operation, whereby an erroneous sum is entered in such consent decree, where all the parties are agreed on the basis of the calculation, and the mistake is simply an arithmetical mistake, or a simple blunder, in performing an arithmetical operation, all parties being agreed on the operation to be performed.

3. EQUITY PRACTICE—CLERICAL ERROR.

In order that a decree may be corrected or reversed on motion under section 1 of chapter 134 of the Code, the error complained of must be a clerical error, or error in fact for which a judgment or decree may be reversed or corrected on motion or writ of error *coram nobis*.

4. EQUITY PRACTICE—COMMISSIONER'S REPORT.

When questions purely of fact are referred to a commissioner, to be reported upon, the findings of the commissioner, while not as conclusive as the verdict of a jury, will be given great weight, and should be sustained unless it plainly appears that they are not warranted by the evidence. This rule operates with peculiar force in an appellate court where the findings of the commissioner have been approved and sustained by the decree of the inferior court.

5. EQUITY PRACTICE—EXCEPTIONS—COMMISSIONER'S REPORT.

Generally, exceptions to the report of master commissioners

partake of the nature of special demurrers, and, if the report is erroneous, the party complaining of the report or excepting there-to must point out the errors in his exceptions with reasonable certainty, so as to direct the mind of the court to them. When he does so, the parts not excepted to are admitted to be correct, not only as regards the principles, but also as relates to the evidence, on which they are founded.

7. EQUITY PRACTICE—CONSENT DECREE—CLERICAL ERROR.

A decree or order made by consent can not be set aside either by rehearing or appeal or by bill of review, unless by clerical error anything has been inserted in the order as by consent, to which the party had not consented, in which case a bill of review might lie.

U. N. ARNETT, JR., and J. A. HAGGERTY for appellant, cited Bently on Personal Property, § 85; 9 Cowan 687; 18 Am. Dec. 543; 1 Humph. 498, 505; McMull. 459; 18 W. Va. 244.

Cox & BAKER for appellees, cited 7 W. Va. 152, 380; Code, c. 130, s. 14; Code, c. 78, s. 9; 28 W. Va. 370; 17 W. Va. 649; 11 W. Va. 482 and 400; 2 Bart. Ch. Pr. 796, 797; 1 Id. 126-7, 339; 11 W. Va. 482; 29 W. Va. 201, 400; Code, c. 134, s. 5; 23 W. Va. 482, 485; 3 W. Va. 659; 8 W. Va. 174 *et seq.*; 1 Bart. Ch. Pr. 332, 334, 336; 12 W. Va. 371; 25 W. Va. 544, 549; Code, c. 133, s. 12; 2 Bouv. L. D. 569; 2 Waits Act. & Def. 247 *et seq.*; Code, p. 668, s. 6.

OKEY JOHNSON for appellee, cited 31 W. Va. 137; 11 W. Va. 482; 17 W. Va. 649; 14 W. Va. 531; 18 W. Va. 184; 26 W. Va. 710; 18 W. Va. 507; 30 W. Va. 147; 33 W. Va. 157.

ENGLISH, JUDGE:

Robert Stewart was at one time the owner of a tract of land situated in Monongalia county, on which he resided, and raised a family of eleven, consisting of sons and daughters. He died intestate, leaving his children, four boys and seven girls, surviving him, whose names were as follows: William, Charles, John, Foster, Anna, Isabel, Elizabeth, Mary, Susannah, Jane and Rebecca. Four of them, to wit, William, Charles, Anna and Isabel, married, while the other seven remained single. Isabel had no children, but to the other three who married were born eighteen children, and this suit was brought by seventeen of the grand-children

of said Robert Stewart against John Stewart, Jr., who was a son of said Charles Stewart, to obtain a partition of the real estate inherited from their uncles and aunts, and also to obtain a share of the personal estate left by said uncles and aunts; the said John Stewart, Jr., claiming to be the sole owner of the personal estate left by said relatives.

All of the children of said Robert Stewart were dead at the time of the institution of this suit: John Stewart, Sr., and Rebecca Stewart alone of said eleven children having disposed of their property by will, and under the will of said Rebecca said John Stewart claims the personal property entirely, and a large portion of the real estate.

When Anna, Charles and William married, they sold their interest in the home farm to Foster, Mary, Susannah, Elizabeth and Jane; Isabel becoming no party to the purchase, but retaining her interest.

In the winter of 1866-67, said Foster, Susannah, Elizabeth, Jane and Rebecca bought a farm known as the "Smith Farm," containing seventy five acres, adjoining the home farm. The unmarried brothers and sisters made their home on these lands, and cultivated the same, and, being industrious and frugal, their earnings went into a common fund, they living together as one family.

The bill in this cause was filed in the Circuit Court of Monongalia county on the first Monday in January, 1889, by William H. Stewart and others. The process appears to have been returned executed, the rules seem to have been regularly taken, the bill regularly taken for confessed, and the cause set for hearing. On the 22d day of February, 1889, the defendant, John Stewart, filed his answer to the plaintiffs' bill, and the plaintiffs replied generally thereto. On the 24th day of June, 1889, the case was heard upon the bill and upon the answer of said John Stewart in his own right, also as devisee of Rebecca Stewart, deceased, general replication thereto, exhibits and depositions, on consideration whereof the court was of opinion that John Stewart, deceased, by his last will and testament, dated February 10, 1864, devised his real and personal estate to his four sisters Elizabeth Stewart, Mary Stewart, Susannah Stewart and Rebecca

Stewart and his brother Foster Stewart for life, until the death of the last mentioned of them, and then, to be divided among their legal heirs, and that their sister Jane took nothing by said will; and the court, being of opinion that the cause should be referred to a commissioner, proceeded to refer it to John J. Brown, commissioner, to report certain requirements therein set forth.

On the 12th day of November, 1889, another decree appears to have been entered in said cause, when it was heard upon the report of said commissioner, John J. Brown, and exceptions thereto both by plaintiffs and defendants, and on consideration thereof the court appointed commissioners, and directed them to go upon the lands in the bill mentioned, and partition them between the said John Stewart and the plaintiffs in the manner and the proportions therein prescribed.

On the 27th day of February, 1890, the report of John E. Price, surveyor, and Joseph Reiner, two of the commissioners appointed by said decree of November 12, 1889, was recommitted, and William H. Brand, surveyor, was substituted in the place of John E. Price, surveyor.

On the 25th day of June, 1890, another decree was entered in said cause, in which it is stated that on that day John A. Dille, a member of the firm of Dille & Son, who brought this suit for the plaintiffs, which had been pending over a year, filed his affidavit, from which it appeared that a large amount of testimony had been taken; that there had been a decree of reference, and a report thereon, showing the amount of lands coming to the plaintiffs, and the amount to the defendants, the amount of personalty coming to each, and settling generally the rights of the parties to the suit; that there had also been a decree appointing commissioners to make partition of said lands, and a report made, which was recommitted, that the said Dille & Son had all of said papers in their office for examination, *etc.*, and that the whole of said original papers, including bill, answer, exhibits, depositions and reports, were, on the morning of the 17th of March, 1890, destroyed by fire by the burning of the law office of the said Dille & Son, and that the bill then filed, marked "Filed May 7, 1890," was substantially a copy of

said bill, and that exhibits from one to six were true copies of exhibits filed with said original bill, and exhibits marked seven, eight, nine and ten were filed with said last named bill; and the court, having seen and inspected said affidavit, bill and exhibits, ordered that the said cause be docketed again in said court, and proceeded in, heard and determined on said copy of said bill, exhibits, depositions and proceedings thereafter had according to section 14 of chapter 130 of the Code, and the defendant, should he choose to do so, should have leave to file his answer to said bill or demur thereto; and the cause was remanded to rules for further proceedings therein. The defendant, John Stewart, appeared at rules, and answered said bill, first saving all just exceptions thereto, and demurring to the same as insufficient in law.

The plaintiffs, in their bill, after showing their relation to their grandfather, Robert Stewart, proceeded to state: That said Robert died seised and possessed of the seventy five acre-tract of land aforesaid, but of little or no personalty, leaving the eleven children whose names have been already given, who with their mother, continued for many years to reside on said farm; and that whatever was saved or accumulated was kept by them as a joint property until about the 10th day of April, 1855, when Charles, William and Anna were married, when said William and wife, Charles and wife and Anna and her husband, Lot Henthorne, sold and conveyed their undivided three elevenths of said farm to their five sisters and brothers, to wit, Mary, Susannah, Elizabeth, Jane, Rebecca and Foster, and that left the family to consist of the widow and eight children, each having one-eleventh in said farm, and Mary, Susannah, Elizabeth, Foster, Jane and Rebecca having in addition thereto, the undivided three-elevenths of Charles, William and Anna. That they all lived together, worked the farm jointly, and the accumulations were held together, each contributing their just proportion of the labor necessary to run said farm successfully and profitably, until the 11th of February, 1864, when John departed this life testate, devising his estate, both real and personal, to his brother Foster, and his sisters Mary, Susan-

nah, Elizabeth and Rebecca, and the survivors of them, for life, and then to descend to his legal heirs. After the death of John, and from that time until the death of Mary, on the 2d day of April, 1865, the family consisted of Mary, Susannah, Elizabeth, Isabel, Foster, Jane and Rebecca, who all lived together, and had whatever of personal estate had been accumulated during the lifetime of John in common, and whatever interest John had therein passed under his will to those surviving him, without any distribution among those entitled thereto, and Mary's interest in said personal estate, as well as her interest in the home-farm, whether by descent or purchase, descended to her legal heirs without any partition or distribution, and thus the said estate remained in the hands of said survivors, to wit, Susannah, Elizabeth, Foster, Jane and Rebecca; Isabel having in the meantime married Pierpoint, and moved away from said home tract, and remained away until the death of her husband, and when she returned she only made her home with her brother and sisters, having and enjoying a pension from the government; and the savings and accumulations up to the 27th day of March, 1867, were invested by them in the Smith farm, of about seventy three acres, adjoining the home-farm; and the plaintiffs allege that the money invested in said Smith farm was the joint accumulations of said John in his lifetime, Mary during her lifetime, Susannah, Elizabeth, Foster, Jane and Rebecca; and said Smith farm, at the death of said respective grantees (Rebecca excepted) descended to their legal heirs. After the death of the said Mary, the said home-farm, as well as the Smith farm, was held, used and enjoyed by the said Susannah, Elizabeth, Foster, Jane and Rebecca, and whatever they accumulated on said farms was held by them up to the death of Susannah which occurred on the 19th day of May, 1870, and they allege that the general impression was that the personal estate at that time could not amount to less than one or two thousand dollars, and the whole passed into the possession of Elizabeth, Foster, Jane and Rebecca, and there remained, with the accumulations thereon, until the death of Foster, on the 5th of April, 1872. Then the two farms went into the possession of Elizabeth, Jane and

Rebecca, with the personal estate, and they had the entire rents and profits thereof until the death of Elizabeth, which occurred on the 20th day of July, 1883. Said real and personal estate then went to Jane and Rebecca, who possessed and enjoyed the whole thereof up to the time of the burning of their house, the latter part of the year 1887; and that very little of the money on hand was destroyed by said fire, and all of the personal estate, moneys, notes, *etc.*, not destroyed by the fire was held by said two sisters, and was the joint property of plaintiffs, as the heirs of their said uncles and aunts, and the said Jane and Rebecca. And they allege that they are informed and believe there must have been from one to two thousand dollars in money saved from said fire, in addition to the notes and accounts held by them, personal property, stock on said farm, *etc.*; that said Jane and Rebecca held the same for the benefit of themselves and the plaintiffs, including whatever real and personal estate was left them by their aunt Isabel, who died on the 13th day of November, 1885, and that the money left by said deceased aunt could not be less than one thousand dollars; that the whole of the personal property specified in the appraisement bill of John Stewart, executor of Rebecca Stewart, deceased, was the same personal property that was in the joint possession of said Elizabeth, Jane and Rebecca previous to the death of said Elizabeth, on the 20th day of July, 1883, and the death of said Jane, on the 15th day of January, 1888, and that the said John, who lived on the said Smith farm, and was the tenant of his said aunts, was fully advised in reference thereto; and they allege that the said John Stewart, Sr., Mary, Susannah, Elizabeth, Foster, Jane and Rebecca all worked together, and held their accumulations in common, and, although the business may have been done at one time by one and at another time by another, no one had any more in it than another; and that Rebecca Stewart, the last survivor of Robert Stewart's family, would have died, as did the rest, without making any disposition of her interest in said estate, had it not been for her age and the influence of some one upon her in her weakness and old age, as she was about eighty years of age when she died, on the 2d day of July, 1888. But

plaintiffs say that if John, the devisee of said Rebecca, will let them have their interest in said property, they will say nothing about said will, and let said John have the undivided interest of Rebecca in said real and personal estate; but they claim the residue as aforesaid. They exhibit a copy of the will of Rebecca Stewart, deceased, and also a copy of the appraisement bill of her personal estate, and they ask the defendant to answer; and say what items, if any, in said appraisement bill, were the separate property of said Rebecca; that he also state what money was saved from the fire, who took the same from the house, and whether, after the death of said Rebecca, all of said money and personal property did not come into his possession, and whether or not, to his knowledge, the said Rebecca ever inherited any property, real or personal, other than what she inherited from her father, brother and sisters. And they claim their undivided interest in said farms and personal estate, and, as their interests in said land are small to each one, being eighteen in number, that their interest in the whole land be laid off together, in order that the same may be sold together, and the proceeds be divided between them, as it is not susceptible of partition in kind between them; and that John's, the defendant's share, if he so desires it, be laid off together, either from both tracts or wholly from one of them, as shall seem best, by commissioners appointed for that purpose; that the case may be referred to one of the commissioners of the court, to ascertain what amount each of said heirs (the plaintiffs, as heirs of William, Charles and Anna) have in each of said farms, and what amount the defendant has, as one of the heirs of Charles and as devisee of Rebecca, who has been in possession of said real estate since the death of Rebecca, the rents and profits, and who is entitled to same, what personal estate came into the hands of said John Stewart at the death of Rebecca belonging to said John, as devisee, and these plaintiffs, and the amount coming to each.

In his answer to the plaintiffs' bill, the defendant, John Stewart, admits the allegations of the bill as to his being the son of Charles Stewart and the grandson of Robert Stewart, as well as the other allegations of the bill which

state the names and number of the children of said Robert, and also as to the property left by the said Robert at the time he died intestate; that all of the children of said Robert are now dead, Rebecca being the last survivor, and that the orders, as well as the time of the deaths of all of said children are about accurately stated; and claims that no one could administer upon the estate of any of them until after Rebecca's death, when he qualified as executor of her estate, as requested by her will. He also admits the facts stated in the bill as to the sale by William and wife, Charles and wife, and Anna Henthorne and husband to Mary, Susannah, Elizabeth, Jane and Foster, and also as to the purchase of the Smith tract by said Foster Stewart and his sisters, Elizabeth, Susannah, Rebecca and Jane, in which he says neither the said William nor Charles nor Anna had any interest whatever unless it be held that they inherited an interest therein at the death of said purchasers, respectively, which he does not admit. Respondent admits that the sisters and their brother made their homes together on said farm, but he denies that they all worked the farm. He says the females all aided in the housework, but that Rebecca was the best qualified to acquire or manage or dispose of property, and she was in fact the manager and controller of both of said farms, as well as of all the stock and other property on them, and rented said lands to respondent in her own name, and the other sisters seemed to be living there by the sufferance and pleasure of Rebecca; that he paid the rents to Rebecca or her order, and the rents were taken to the dwelling house on the home farm, and used there in the support of the family and in feeding the stock. The residue of the answer is somewhat argumentative, but puts in issue the material allegations of the bill, and in answer to the specific interrogatories propounded to him by the bill he says that, as he understands it, and understood it at the death of the said Rebecca, each and all of the items described in said appraisal bill were, at the time of her death, the sole and separate property of the said Rebecca, and were so, as he believes and understood it, for years before she died, but he can not say from whom she acquired or derived

them, or how she obtained them; that he does not know and can not say how much money was in fact saved from the fire except the seventeen and one fourth pounds of foreign and mutilated coin and a five or ten dollar gold piece picked up by some one afterwards near the burned house; nor can he remember who in fact took the money so found from the said house, and all of the money so found after the death of Rebecca and after respondent's qualification came into his possession as such executor, to hold until the right thereto should be settled, and is still so held by him, except that he was advised to have said foreign coin valued by a competent person, and disposed of, and put into current funds, which he did, and the same was so found to be of forty three dollars and thirty five cents less value than as so appraised; and that he has no knowledge of said Rebecca inheriting any property, real or personal, other than what she so inherited from her father, brother and sisters; and he denies each and every allegation of said bill in conflict with this answer.

On the 12th day of February, 1892, the cause was heard upon the bill and exhibits supplied according to law, together with the affidavit of the loss of the original papers by fire in the law office of Dille & Son, and the answer of John Stewart in his own right and general replication thereto, and upon the statement of John J. Brown, commissioner in chancery, to whom the case had been referred at a former term of the court, setting out according to the best recollection of said commissioner, the substance of his report in this case under the order of reference made therein, and exceptions to the supplied report of said commissioner by the plaintiffs indorsed thereon in writing, and upon the depositions for the plaintiff taken in the cause, and upon the orders and decrees made in the cause and depositions; upon consideration whereof the court was of opinion that the exceptions to the statement or supplied report of John J. Brown, commissioner, as aforesaid, were well taken, and it was decreed that the cause be recommitted to I. G. Lazzell, a commissioner in chancery, to ascertain and report certain facts therein specified. On the 21st day of June, 1892, a decree

was entered in said cause, when it appears to have been heard on the papers theretofore filed in the cause, and orders and decrees thereinbefore made, depositions and exhibits, and upon the report of John E. Price, surveyor, Joseph Reiner and William B. Long, commissioners, appointed at the February term, last, to go upon the lands in the bill and proceedings mentioned and described, and make partition thereof, according to quantity and value, among the plaintiffs in the suit sixty *per centum* of said lands, and to the defendant John Stewart, forty *per centum* of said lands; and it appearing to the court that the report of the said commissioners, and the plat filed therewith, are regular on their face, and, there being no exception to the same, they were approved and confirmed, and it was decreed that the plaintiffs should take and hold in fee simple lot number two as laid down in the plat and report of said commissioners, being sixty *per centum* of said land according to quantity and value, bounded and described as set out by metes and bounds in said decree, containing eighty five and a half acres, more or less; and that the defendant, John Stewart, do hold in fee simple lot number one as shown on said report and plat, being forty *per centum* of said lands, bounded and described as set forth in said decree by metes and bounds, containing seventy two and one half acres, more or less; and that a writ of possession do issue out of the office of the clerk of said court, and that the plaintiffs be placed in possession of the lands so assigned to them in this partition upon the application of any of said plaintiffs, and that the plaintiffs do pay sixty *per centum* of the costs of said partition and the defendant forty *per centum* thereof; and it appearing to the court that I. G. Lazzell, to whom this cause was referred at a former term, had not made up his report, all matters so referred to said commissioner were reserved for future consideration of the court.

On the 19th day of October, 1892, the final decree in the cause was entered, when the same was heard upon the papers and decrees before read therein, and upon the report of I. G. Lazzell, a commissioner in chancery, to whom the cause was referred, as before stated, and the depositions taken before

said commissioner and other proper officers, and upon the exceptions to said report by counsel for defendant, overruling said exceptions in part and sustaining them in part, as appears from the face of said decree; and the said commissioner having found a net balance of personalty in the hands of John Stewart for distribution amounting to one thousand three hundred and sixty five dollars and forty seven cents, of which amount eight hundred and nineteen dollars and twenty four cents was to be paid to the seventeen plaintiffs and five hundred and forty six dollars and twenty three cents to be retained by the defendant, John Stewart, and ordered that the said sum of eight hundred and nineteen dollars and twenty four cents be a lien upon the real estate of said John Stewart, and directed that said John Stewart pay the costs of said suit, except the costs of partition, which had been provided for in a former decree.

It appears from the record that the decree appointing commissioners to go upon the lands in controversy and partition them in the proportion of sixty *per centum* to the plaintiffs and forty *per centum* to the defendant was a consent decree, appointing commissioners therein named to go upon said lands, and partition them in that proportion, which report was made by said commissioners, and confirmed without exception. The defendant, John Stewart, on the 18th day of February, 1893, had a notice served upon the plaintiffs of a motion to reverse the final decree rendered in said cause under the provisions of chapter one hundred and thirty four of the Code, which motion was supported by his own affidavit, in which he denies that any person was authorized to consent to said decree ascertaining the proportions in which the parties were entitled to the land in controversy. He is, however, contradicted by the affidavit of his attorney, who states that Keckson & Fast were the attorneys of record for the said Stewart, defendant in said suit, and they had full and complete authority to bind the defendant, and that they did consent as shown by said decree.

The errors, however, which are sought to be corrected under this notice are not such errors as may be so corrected under the statute.

Upon this question, Minor, in his Institutes (volume 4, pt. 1, at page 854) says: "It is clear that the provision was intended to apply exclusively to those inadvertencies of the clerk which depend upon a comparison and calculation to be made by him, and which may be safely reformed by reference to other statements in writing obtained in the proceedings, and not at all to judicial errors growing out of a mistaken application of the law to the facts, notwithstanding such mistaken application by made to the clerk alone, and the court be not directly privy to it." So, in the case of *Compton v. Cline*, 5 Gratt. 137, an action of debt on a bond for one hundred and eighty eight dollars was described in the declaration as for one hundred and eight dollars, and the defendant confessed judgment for "the debt in the declaration mentioned," and judgment was entered for one hundred and eight dollars. This was held to be a judicial, and not a clerical error, and not amendable at a subsequent term of the court. In the case of *Morris' Adm'r v. Peyton's Adm'r*, 29 W. Va. 201 (11 S. E. Rep. 954) this Court held that "after the end of the term at which a consent decree is entered it can not be set aside, modified, or altered without the consent of the parties, except only to correct a clerical error," and that "a clerical error is a mistake made by the clerk in entering such consent decree, and it may be corrected by the original draft of the decree furnished the clerk by the court; or it may be a miscalculation or mistake in some arithmetical operation, whereby a sum entered in such consent decree where all the parties are agreed on the basis of the calculation, and the mistake is simply an arithmetical mistake or a simple blunder in performing an arithmetical operation, all parties being agreed on the operation to be performed."

The defendant, however, by this notice sought to reopen the merits of the case, and again determine the proportions in which the parties were entitled to the real estate in controversy, and to reverse and correct the decrees in that respect, which we think was not permissible, and the court acted properly in refusing to interfere with or set aside said decrees upon said notice. The action of the court in re-

fusing to set aside said decrees is not assigned by the defendant as error, but, as it forms part of the record, we thought proper to make the above comment upon the action of the court.

The next step taken by the defendant, John Stewart, was to file a bill of review, in which, after reciting the proceedings had in said original cause, the destruction of the original papers by fire, and the manner in which they were supplied, he alleges that the papers supplied and filed in said cause are not the true and authenticated copies of the original papers filed in said cause, and alleges that his original answer differed very materially in its allegations from what is alleged in his answer, and points out the particulars in which said difference consists, and says that, by reason of the omission and failure to set up, claim, and charge the same in said supplied answer, he was, by the decree of the court, deprived of all of the interest in the said eighty five acres of land and personal property of which Rebecca Stewart died seised, and which was devised to him by her last will and testament. Said John Stewart also charges in said bill of review: That by reason of the failure and omission of his counsel to set up and state in said supplied answer the said allegations, claims and interest of the said Rebecca Stewart as stated in said original answer, he was wrongfully deprived of a large portion of the interests, estate and property willed and devised to him by the last will and testament of said Rebecca Stewart, and that the decrees entered in said cause upon said supplied papers therein as aforesaid, making partition and distribution of said estate, are erroneous and prejudicial to the rights, interests and claims of plaintiff, and, as he is advised and believes, ought to be reviewed, reversed and set aside; and that the decree charging him with one thousand three hundred and fifty dollars and twenty one cents as executor of the last will of Rebecca Stewart, is also erroneous, and should be reviewed, reversed and set aside. That the said will of Rebecca Stewart gives to him absolutely all of the personal estate of which said Rebecca died seised, including all of the personal property, money and effects contained in said appraisement bill, a

copy of which is exhibited. That on or about the 12th of November, 1892, a certain other decree was pronounced and entered in said cause, among other things decreeing and directing that said plaintiffs therein do recover from him a large sum of money, together with a large amount of costs attending the said proceedings, a copy of which decree is also exhibited; and that said last named decree ought to be reviewed, reversed and set aside for many apparent errors and imperfections appearing upon the face of said decree and upon the face of the commissioners' report filed in said cause, and from the record of all the proceedings had in said cause. That an execution under said decree had been issued against him, and placed in the hands of the sheriff of said county, directing the sheriff to collect the same out of his personal effects, goods and chattels, and he is threatening to sell the same to satisfy said execution; and, inasmuch as such errors and imperfections appear in the body of said decrees and upon the face of said commissioners' report, he prays that said decrees may be reviewed, reversed and set aside, and that the plaintiffs, and all persons acting for or under them, in levying and taking into possession his property under said decree, may be restrained and enjoined. Which injunction was awarded as prayed for.

The defendants in said bill of review appeared and demurred thereto, and also filed their answer, putting in issue all of the material allegations of said bill, and on the 26th day of June, 1893, the cause was heard upon the bill of review and exhibits therewith filed, and upon the demurrer to said bill and the answer of the defendants and exhibits and general replication of the plaintiff thereto, and upon the motion of the said defendants to dissolve the injunction awarded to the plaintiff therein, and was argued by counsel; upon consideration whereof the court sustained said demurrer, and dismissed the plaintiffs' bill of review, and also dissolved said injunction, and ascertained the amount of principal, interest, damages and costs, including officers' fees and commissions, due on the decree enjoined by said injunction heretofore awarded the plaintiff, and found the sum of forty eight dollars and nineteen cents due to each

of said parties to whom said decree is coming as principal, and the sum of one dollar and five cents to each of said parties as interest from the 19th of October, 1892, to the 30th day of March, 1893, and that the parties to whom said decree is coming are entitled to twenty dollars and thirty one cents in the aggregate as damages in lieu of interest at the rate of ten per cent. from the time the injunction took effect until the date of said decree, being one dollar and nineteen cents to each of said seventeen parties, and that there is due to said parties to whom said decree is coming the sum of three hundred and sixty dollars and seventy seven cents in the aggregate as costs on said decree, including officers' fees to date, as taxed by the clerk of the court, being the sum of twenty one dollars and twenty two cents due to each of said seventeen parties to whom said decree is coming, making in all due to said parties to whom said decree is coming of principal, interest, damages and costs, including officers' fees at this date by reason of said decree, the aggregate sum of one thousand two hundred and eighteen dollars and nineteen cents, being the sum of seventy one dollars and sixty eight cents coming to each of said seventeen parties, and directed execution to issue therefor against said John Stewart, and also directing that they recover their costs about their defense in this cause expended, and that execution issue therefor. The said John Stewart obtained this appeal.

The first assignment of error relied upon by the appellant is to the action of the court in directing a partition of the real estate in the first of said causes mentioned and described among the persons named in said decree of partition without first passing on the exceptions to the report of Commissioner John J. Brown, taken by both plaintiffs and defendant, for the reason that, if said exceptions had been passed on at that time, it would never have been proper to direct said partition in the manner that the same in said decree was and is directed. Now, it appears on the face of said decree that at the time the same was rendered the original papers, including the report of John J. Brown, and the exceptions endorsed thereon, had been consumed by fire in

the office of Dille & Son, attorneys for the plaintiffs, and that said John J. Brown had attempted to supply his former report from his best recollection, which supplied report had also been excepted to by the plaintiffs; and it further appears on the face of said decree that by consent of the plaintiffs and defendant by their respective counsel, it was agreed that the plaintiffs were entitled to sixty *per cent.* (according to quantity and value) of the land in the bill and proceedings mentioned, and that the defendant, John Stewart, was entitled to forty *per centum* (according to quantity and value) of the said lands as reported by John J. Brown, to whom said matter, among others, was referred, as commissioner, to make report thereon. This consent, entered of record, then, can be construed in no other way than as a waiver of all exceptions as to the finding of said commissioner, John J. Brown as to the proportion in which said parties plaintiff and defendant were entitled to said real estate, so that there can be nothing in the assertion made in said assignment of error that if said exceptions to Brown's report had been passed on, said partition would not have been directed in the manner the same was directed or that it would not have been proper to so direct it; and for the further reason that the same decree appointed commissioners to make said partition, whose report was confirmed without exception or objection.

The second assignment of error claims that the Circuit Court erred in making and entering the decree of reference of June 24, 1889, by therein directing that the commissioner should settle the accounts of the defendant as executor of the estate of Rebecca Stewart, deceased, while the suit was brought for the purpose of ascertaining the interest of the plaintiffs in the personal estate of Robert, John, Elizabeth, Mary, Susannah, Jane and Foster Stewart, and it is shown by all the papers in the cause that the plaintiffs had no interest or rights in the estate of said Rebecca. As to this decree, it appears that it was entered before the papers were burnt, and, after the papers were supplied, a consent decree was entered, directing the commissioner then appointed to settle the accounts of defendant as executor of the estate of

said Rebecca, and ascertain what came into his hands as such executor, what portion of it belonged to Rebecca Stewart, and what belongs to plaintiffs, if any, and what was done with the property, and the first exception endorsed on the report of I. G. Lazzell by the defendant is because it does not purport to settle the executorial account of said defendant as required by the order of reference, clause ten, as there can not be any recovery here against him, or distribution decreed, until that is done. It is true, the commissioner did not settle said John Stewart's account as such executor, and he is now claiming that it was error in the court to have directed such settlement. The proper answer to this assignment of error is that the defendant is not prejudiced by the failure of the commissioner to settle his said account, and he can not be heard to complain of it here.

The next assignment of error is to the action of the court in allowing the papers to be supplied in the manner they were, instead of requiring a new suit to be brought, as was manifestly at the time unjust to the said petitioner; and because the supplying of the same in the manner they were attempted to be supplied was prejudicial to the rights of said petitioner, because the affidavit upon which the said papers were supplied was insufficient under the statute. Now, it is apparent that this assignment of error should not avail the defendant, for the reason that if the defendant had wished it, and had so moved, the court might have required new pleadings to be made up under the provisions of section fourteen of chapter one hundred and thirty which says, among other things, that "the court may, at the instance of either party, or in its discretion, require new pleadings to be made up in whole or in part;" but the defendant in this case, so far as appears, made no suggestion in regard to new pleadings, but appeared promptly at rules, and filed his answer, thereby submitting himself to the jurisdiction of the court, and waiving the alleged irregularities in supplying the papers, if any such existed. See *Rittenhouse v. Harman*, 7 W. Va. 380, where it is held that, "though a bill be multifarious, and but vaguely state the matter on which relief is sought, consent by the parties to an interlocutory de-

cree that the cause be referred to a commissioner to audit, state and settle an account of the amount due each of the plaintiffs is a waiver of any objection to such irregularity, and a demurrer thereafter for such cause is properly disallowed."

The next assignment of error is that the court erred in the decree of partition as to the Smith land in the manner it was partitioned by said court, for the reason that the said Rebecca Stewart had far more interest in the same, as she had also in the home farm—and which said interest also passed to defendant—than had all of the plaintiffs combined, and than is allowed and ascertained by the court in the said final decree in said first named chancery cause. This assignment of error is also met and overthrown by the consent decree, which ascertained the proportions in which the parties were entitled to said land; and the defendant, having consented on the record to said decree, can not now be heard to object or complain after the matter has been referred to a commissioner under a consent decree, and the commissioner's report confirmed without exception.

The next assignment of error is that the "court erred in its final decree in the distribution of the personalty left by Rebecca Stewart, because the heirs of John Stewart would have no interest in any accumulations of personalty of the life-tenant from said real estate (not acquired more than two years after the death of John Stewart) nor would the plaintiffs have any interest as heirs in the personal estate of Rebecca Stewart, or any accumulations therein." This depends to some extent upon the facts which were submitted to the commissioner for ascertainment in pursuance of the agreement of record, and the facts having been ascertained by the commissioner, and reported to the court, and the report having been confirmed by the court. The question is determined by the case of *Handy v. Scott*, 26 W. Va. 710, in which this Court held that: "When questions purely of fact are referred to a commissioner to be reported upon, the findings of the commissioner, while not as conclusive as the verdict of a jury, will be given great weight, and should be sustained unless it plainly appears that they are not war-

ranted by the evidence. This rule operates with peculiar force in an appellate court where the findings of the commissioner have been approved and sustained by the decree of the inferior court." See, also, *Moore v. Ligon*, 30 W. Va. 146 (3 S. E. Rep. 572); and *Reger v. O'Neal*, 33 W. Va. 159 (10 S. E. Rep. 375). And as to the distribution of the personal estate the Code provides, s. 9, c. 78, that when any person shall die intestate as to his personal estate, or any part thereof, the surplus, after the payment of funeral expenses, charges of administration and debts, shall pass and be distributed to and among the same persons, and in the same proportions, to whom and in which the real estate is directed to descend, *etc.* Now, in this case, the plaintiffs and the defendant, with all the facts before them, have seen proper by consent and agreement to fix the proportions in which the real estate in controversy should be divided, giving to the plaintiffs sixty *per cent.* and to the defendant forty *per cent.* thereof, and no good reason is assigned why the personalty should not be shared in the same proportion, although the court in this instance seems to have decreed the defendant fifty *per cent.* instead of forty *per cent.*; and, if this is an error, it is one of which the defendant can not complain.

The weight of evidence clearly indicates that the children of Robert Stewart who became the purchasers of the home place from those that married and moved away lived on the farm as a family, and what was realized from their labor became a common fund, and this view of the case is sustained by the fact that John Stewart, Sr., in his last will and testament, gave his property to his brother Foster and five sisters, who were living on the farm, in equal proportions, and directed that in case of the death of either of them the others were to have his or her share, and to continue in the same way until the death of the last heir, then to be divided among his legal heirs; showing the intention to keep the property in the hands of those residing on the farm as long as they or any of them lived. And when Rebecca came to dispose of her property by will she could dispose of no more than she was entitled to. If the personal property in her

possession was the result of the joint labor and industry of herself and those who had lived and died on the farm, she would be entitled to no more than she inherited, and could dispose of no more than she was entitled to; so that the determination of the question as to the proper disposition or distribution of the personal property depends at last upon the facts proven, and the proper conclusion to be reached therefrom. This entire matter has been referred to a commissioner, who has reported, and whose report has been confirmed by the court. It is true, the report of the commissioner was excepted to, but the exceptions were overruled by the court, as we think, properly. The rule in regard to exceptions to commissioners' reports is laid down in the case of *Chapman v. Railroad Co.*, 18 W. Va. 185, section 9 of syllabus, as follows: "Generally, exceptions to the reports of master commissioners partake of the nature of special demurrers, and, if the report is erroneous, the party complaining of the report or excepting thereto must point out the errors in his exceptions with reasonable certainty, so as to direct the mind of the court to them. When he does so, the parts not excepted to are admitted to be correct, not only as regards the principles, but also as relates to the evidence on which they are founded." See, also, *McCarthy v. Chalfant*, 14 W. Va. 531. The exceptions to this report are too general, and partake more of the nature of an argument upon the facts alleged to have been proven than they do to that of a special demurrer, and were properly overruled.

The question raised as to setting aside the final decree upon notice and motion has already been adverted to, and, in addition, it is only thought necessary to say that this was not a decree by default; nor, if any error existed, was it such an error as could be corrected under section one of chapter one hundred and thirty four of the Code, and the court committed no error in refusing to set aside said decree upon said notice and motion.

We come now to consider the last error assigned by the appellant, to wit, that the court erred in sustaining the demurrer to the appellant's bill of review, and dissolving the injunction granted in aid of the same. In discussing the

questions arising in the original cause we have passed upon all of the questions raised by the bill of review, even if the court would entertain a bill of review under the circumstances of this case. Did the court err in sustaining the demurrer to said bill of review? We have seen that the land in controversy was partitioned under a consent decree, and the report of the commissioners appointed to make such partition was confirmed without exception; that by the same consent decree the cause was referred to a commissioner to report certain matters necessary to a proper distribution of the personalty, who reported, and, although the report was excepted to, the exceptions, as we think, were properly overruled. Upon the question, then, as to whether said demurrer was properly sustained, we find the law stated in *Sands' Suit in Equity*, page 695, § 631, as follows: "The causes for which a bill of review may be maintained are limited to these: (1.) There must be error in law apparent upon the face of the decree;" citing 2 Rob. Prac. (Old) 414, etc. "(2) The party seeking to review the decree must allege and prove the discovery of new matter, which could not have been used at the time of making the decree in consequence of the parties' ignorance that such matters existed." See *Amiss v. McGinnis*, 12 W. Va. 371. The errors suggested by this bill of review, however, are claimed to be errors of fact, and not errors of law, and there is no claim as to after discovered evidence. But again we find the law with reference to bills of this character stated in *Daniell's Chancery Practice*, volume 2 (6th Ed.) on page 974, as follows: "A decree or order made by consent can not be set aside, either by rehearing or appeal or by bill of review, unless by clerical error anything has been inserted in the order as by consent, to which the party has not consented, in which case a bill of review might lie." See, also, *Thompson v. Railroad Co.*, 95 U. S. 391, where it is held that "none but parties and privies can have a bill of review, and it will not lie where the decree in question was passed by consent." See, also, 2 *Daniell*, Ch. Pr. p. 157. And, while the final decree in the original cause was not a consent decree, the decree which settled the principles of the cause was a con-

sent decree, and the final decree followed as a consequence.

For these reasons my conclusion is that the court committed no error in sustaining the demurrer to said bill of review, and the decree complained of must be affirmed, with costs and damages.

CHARLESTON.

THOMPSON v. LYON.

Submitted June 12, 1894—Decided December 8, 1894.

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1. CHARGE ON LAND.

A father deeds to his son a tract of land, in consideration of the payment of a certain sum therein named by said son to his two sisters, one year after the father's death, without interest. Such son is not bound to wait until the end of the year after his father's death before he can pay said amount, but has the privilege of paying it at any time during the year.

2. CHARGE ON LAND—TENDER.

An offer to pay one of the sisters the amount coming to her under the deed, two or three days before the end of the year, and counting the money down to her, which she declined to receive, without assigning any cause, constituted a valid tender, under the circumstances.

3. CHARGE ON LAND—VENDOR'S LIEN.

Said sister having made no subsequent demand for the money, said son, upon paying the money due said sister into court after giving proper notice, was entitled to a release of the vendor's lien reserved in said deed, so far as it secured her said sum.

4. TENDER—WAIVER.

A strictly legal tender may be waived by an absolute refusal to receive the money, on the ground that no man is bound to perform a nugatory act.

5. TENDER.

It is not necessary, to constitute a legal tender, that the identical money tendered was kept and brought into court.

6. TENDER—INTEREST.

In general the effect of a tender in proper time by the debtor is to stop subsequent interest on the claim, if the money is unqualifiedly refused, which tender may be defeated by a subsequent demand and refusal.

JOHN BASSEL for plaintiff in error, cited 7 Wait's Act. & Def. 580, 581; 96 U. S. 580.

JOHN J. DAVIS for defendant in error, cited 3 Har. & McH. 85; 4 Min. Inst. Pt. 1, p. 611; 7 Johns. Ch. 7; 5 Laws R. & R. p. 4181; 34 Ver. 536; 38 N. H. 191; 1 Wash. 26; 4 Call 402; 36 Ill. 18; 67 Ala. 310; 92 Ill. 604; 21 N. Y. 366.

ENGLISH, JUDGE:

By a deed dated the 14th day of May, 1873, Hugh Thompson conveyed to Thomas Thompson a tract of land, in consideration of three hundred and thirty three and one third dollars to be paid by said Thomas Thompson to Nancy J. Lyon and Elizabeth Payne equally, one year after the death of the said Hugh Thompson, and, to secure the same, a vendor's lien was therein retained on said tract of land until paid, and for the further consideration of natural love.

It appears that two or three days before the expiration of the year after the death of said Hugh Thompson, the said Thomas Thompson went to the house of Nancy J. Lyon, and offered to pay her the sum of money she was entitled to under said deed, and counted the money down on a stand to her, and she said she could not take it, and did not take it.

On the 31st day of August, 1893, said Thomas Thompson had a notice served upon said Nancy J. Lyon that on the 14th day of September, 1893, he would move the Circuit Court of the County of Harrison to direct the clerk of the County Court of said county to execute a release of the lien reserved in a certain deed of conveyance made to him by Hugh Thompson on the 14th day of May, 1873, to secure the payment to said Nancy J. Lyon and Elizabeth Payne of the sum of three hundred and thirty three dollars and thirty three and one third cents to be paid to them equally one year after the death of said grantor, Hugh Thompson, on the tract of land therein mentioned, describing it, as he had theretofore tendered her her portion of said sum and she refused to accept the same.

On the 14th day of September, 1893, an order was entered, in pursuance of said motion in which it is stated that the

court having heard the evidence and argument of counsel, and it appearing to said court that said Thomas Thompson duly tendered to the said Nancy J. Lyon her portion of said sum secured to her in said deed, in pursuance of the terms and provisions thereof, which she then refused to receive, and now here pays into court for the said Nancy J. Lyon, the sum of one hundred and sixty six dollars and sixty six and two third cents, her share of the sum so secured to be paid her by said deed; and it further appearing that the sum due Elizabeth Payne has been paid her; and the court being now of opinion that Thomas Thompson is now entitled to have a release of the lien retained in said deed, which the said Nancy J. Lyon refuses to execute—it was ordered that P. M. Long, clerk of the County Court of Harrison county, do execute to said Thomas Thompson a release of the lien reserved in said deed for the benefit of the said Nancy J. Lyon, and that he the said Thomas, recover against her his costs herein expended; and from this order the said Nancy J. Lyon obtained this writ of error.

It is assigned as error that the court held there was a sufficient tender, although the same was made before the money was due. Now, it must be conceded that the weight of authority is that, where one party contracts to pay another money on a certain day, the tender, in order to be available, must be made on the day it falls due. When, however, we look at the circumstances of this transaction, it is apparent that there really was no contract between said Thomas Thompson and Nancy J. Lyon, by which he promised to pay her any money at any specified time. The deed which Hugh Thompson made to his son Thomas imposed upon him, as a condition precedent to his acquiring the title to said land, that he should pay to his sisters Nancy J. Lyon and Elizabeth Payne the sum of three hundred and thirty three dollars and thirty three and one third cents one year after the death of said Hugh Thompson. This length of time, one year, was allowed said Thomas Thompson as a favor, not by Nancy J. Lyon, but by his father, and she was no party to the contract fixing the date of payment, and she could not object if, in pursuance of the terms and conditions imposed

upon him by his father's deed, said Thomas paid said sum before the year expired. His father had conferred upon him the privilege of waiting a year before he paid said money, and Nancy J. Lyon could not complain if he did not exercise the privilege thus conferred to the last moment and to the fullest extent. Again, the money said Thomas was to pay was not bearing interest at the time he offered to pay it to her. Parsons on Contracts (volume 2, 8th Ed., top page 642) says: "It has been said that a tender can not be made before the debt is due, as the creditor is not then obliged to accept it, even if it does not draw interest. But we should be inclined to believe that the courts of this country would generally hold a tender valid that was made before the debt was due, provided the debt did not draw interest, or if, when the debt did draw interest, the tender included interest to the maturity of the debt." In speaking of the effect of the plea of tender, Prof. Minor, in his Institutes, volume 4, point 1, side page 611, says: "The effect of the plea of tender, in a few cases to which it is not needful to advert, is to extinguish the obligation; but, in general, it is merely to relieve the debtor from subsequent interest and costs"—citing Bac. Abr. "Tender," F, where it is said: "The effect of a tender, when lawfully made, is to discharge the debtor from subsequent interest and costs." See *Jackson v. Law*, 5 Cow. 248; also *Raymond v. Bearnard*, 12 Johns. 274.

As we have seen, the debt in the case under consideration did not bear interest at the time Thomas Thompson offered to pay the amount to his sister Mrs. Lyon, the year had not expired from the date of the death of Hugh Thompson, and it is difficult to perceive how she could have been prejudiced by receiving the money at the time it was offered to her. The evidence shows that the money was counted down to her, and, without assigning any reason whatever for her action, she simply said "she could not take it," and did not take it. Now, what is the effect of this conduct on the part of Nancy J. Lyon? Lawson in his work on Rights and Remedies, section 2534, says: "A tender may be waived by the creditor either expressly or impliedly, as where he states that nothing is due him, and that he will accept nothing, or

says, simply, that he will not receive the money or chattels." So, in Litt. Sel. Cas. (Ky.) 204, it was held, in the case of *Dorsey v. Barbee*, that "the positive declaration of one to whom money is to be paid, within a certain time, that he will not receive it, will excuse the tender of the money, provided the declaration is made before the expiration of the time." It was also held by the Supreme Court of Tennessee in the case of *Farnsworth v. Howard*, 1 Cold. 216, that the production of the money is dispensed with if the party is ready and willing to pay, and is about to produce the money, but is prevented by the party to whom the money is going refusing to receive it; but this bare refusal to receive the amount proposed, and demanding more, is not, of itself, sufficient to excuse an actual tender. Again, in the case of *Bellinger v. Kitts*, 6 Barb. 274, it was held that "the general rule is that a strictly legal tender may be waived by an absolute refusal to receive the money, on the principle that no man is bound to perform a nugatory act." And in 10 Cush. 267, in the case of *Hazard v. Loring*, the court held that, "in making a tender, actual production of the money is not necessary, if the defendant refuses to receive it." See, also, 2 Pars. Cont. p. 643. This question was also before this Court in the case of *Koon v. Snodgrass*, 18 W. Va. 320, where it was held that "the proper mode of making a legal tender is to actually produce and proffer the exact sum due; but this may be dispensed with by the party to whom the money is to be paid, when he refuses to receive the money, not on the ground that the money is not produced, nor on the ground that the amount produced was not the exact amount offered, but on some collateral and entirely distinct grounds;" and this case is quoted with approval in 38 W. Va. 80 (18 S. E. Rep. 379) by the court, in the case of *Poling v. Parsons*. Where the money is tendered in proper time, and is refused, all the elements of a technical tender are waived and the effect is precisely the same as if a tender, legal and proper in every respect, had been made; just as where protest of a negotiable note is waived, the indorsers are bound to the same extent as if all the technicalities of a legal process had been complied with, including notice, etc. To illustrate, Parsons on Contracts, volume

2, top page 642, says: "To make a tender of money valid, the money must be actually produced and proffered, unless the creditor expressly or impliedly waives this production, and he does this by declaring that he will not receive it." In the case of *Rudolph v. Wagner*, 36 Ala. 698, the court held that "a tender of the amount due, including interest, at any time between the maturity of the debt and the commencement of the suit, stops the interest and discharges the debtor from the costs of the suit." 2 Pars. Cont., at top page 638, speaking of the effect of a tender, says: "But it puts a stop to accruing damages or interest for delay in payment, and gives the defendant costs." So in *Curtiss v. Greenbanks*, 24 Vt. 536, it was held that, "where money is tendered and refused, the person tendering it is at liberty to use it as his own. All he is under obligations to do is to be ready at all times to pay the debt when requested." And Lawson on Rights and Remedies (volume 5, § 2526) says: "The debtor must keep the money safely, so as to be ready at any time to produce it, but he may use it, and he need not have the identical money ready. * * * But the benefit of a tender is lost by subsequent demand and refusal." And in *Jackson v. Law*, 5 Cow. 248, it is held that "the effect of a tender, when made in season is merely to discharge the debtor from subsequent interest." It is not necessary to prove, under a plea of tender, that the identical money tendered was kept and brought into court. *Colby v. Sterens*, 38 N. H. 191. See also *Railroad Co. v. Dunham*, 30 Mich. 128.

Now, if Nancy J. Lyon refused to accept the money offered her by her brother Thomas Thompson, because it was offered to her a day or two before the year had expired since the death of their father, Hugh Thompson, she failed to assign that as a reason, and, as the amount was not bearing interest, it would have been very unreasonable in her to assign such a motive for rejecting the money. Why should she have objected to receiving the money if it had been offered to her one day or one week after the death of said Hugh Thompson? If she had received it, she could have invested it, and made it an interest bearing fund, instead of permitting it to lie idle in her brother's hands. Why, then, should

she insist that the last day of the year should arrive before she received the money? She did not, however, do this. She simply declined to receive it without assigning any cause, and, so far as the record discloses, she never made any subsequent demand for it. As I read this clause in the deed, Hugh Thompson intended to say to his son Thomas, "You can have one year's time in which to pay this purchase money to your sister"; but he never intended to say he could not pay it sooner, if he chose to waive the privilege conferred by the deed, and, while Nancy J. Lyon had no right to demand the money before the end of the year, she had no right to prevent him from anticipating the payment for one or two days, or six months, if he saw proper to do so.

There is a marked distinction between contracts made between parties for their mutual benefit, where one becomes a borrower of money because he wishes to use it in some business undertaking, and desires such use of it for a definite period, and the other loans it because he desires the interest at stated periods, and wishes to avoid the inconvenience and trouble of making reinvestments at short periods, and the case of a mere charge or lien reserved upon land to secure the payment of money at some future time without interest. In the first instance, each party is directly interested in having the payment of the principal at the time fixed in the contract, and in preventing the payment by way of anticipation; while in the second instance, the party to whom the money is coming has a direct interest in receiving the money as long before the time fixed for the payment as possible. If Thomas Thompson had succeeded in getting Nancy J. Lyon to receive the money when he offered to pay it, it would have been to her benefit, and to his prejudice, and in violation of no contract between her and himself. If the debt had been an interest bearing one, there would have been some excuse for her refusal to receive the money until the year was out; but, as the amount did not bear interest, she could in no way have been prejudiced in receiving the money, and there could be no reason for delaying the tender, if said Thomas was able and willing to make it, until the expiration of the year. In the case of *M'Hard v. Whitcroft*, 3 Har. & McH. 85,

the case considered was an action of debt upon a bond dated the 24th day of September, 1778, and conditioned for the payment of four hundred and forty two pounds and ten shillings at or upon the 1st of September, 1788, with interest. The defendant pleaded payment before the issuing of the writ, to wit, on the first of September, 1788. General replications of non payment and issue joined. At October term, 1790, the jury found by their special verdict that the defendant, in discharge of so much of the bond on which the suit was brought, did tender bills of credit, which was a legal tender by law to the plaintiff, to the amount of one thousand, one hundred and seventy five and two-thirds dollars, which tender was made on the 7th of March, 1781; and, if the said tender was good, then they found that there was thirteen pounds and one shilling specie duty on said bond; but, if the tender in discharge of said bond could not be made before the 1st of September, 1788, then they found due on the said bond eighty eight pounds and ten shillings specie with interest from the date of said bond. The general court gave judgment on the said special verdict for the plaintiff for the penalty and costs, to be released on the payment of eighty eight pounds and ten shillings current money, with interest from the 24th day of September, 1778, and costs. The defendant appealed to the court of appeals, which court, after hearing arguments, reversed the judgment of the general court. Now, in that case, the bond bore interest, and yet the court of appeals held the tender made before the maturity of the bond to be good; and, if that decision be good law, how much more so ought the tender to be held good where the claim bears no interest, as in the case we are considering. If the reason for the law be that it would be an unwarranted infringement of the contract between the parties who had made the contract, for the purpose of enjoying the interest without the trouble of reinvestment, to allow a tender to be good before obligation became due, how much more so should a tender be held good which is made before the claim is due, where the claim bears no interest. The legal maxim, "*Cessante ratione legis cessat et ipsa lex*," applies.

Said Nancy J. Lyon having absolutely declined to receive

the money when offered to her only a day or two before it was due, without assigning any reason for such refusal, and never afterwards having made any demand for the money, my conclusion is, that the plaintiff, having paid the money into court, was entitled to a release of the vendor's lien, and the court committed no error in so ordering; and the judgment complained of is affirmed, with costs and damages.

BRANNON, PRESIDENT, (Concurring):

A question in the case is, after a tender, must the very identical money be kept ready to be paid to the creditor, if he comes for it, or ready to be filed with a plea of tender or other pleading seeking to enforce the tender? If the money be not kept, but is used by the debtor, will he be charged with interest after the tender? I think he need not keep the same money. So he have that same money, or good legal tender money, when demanded of him, or when he brings it into court, that will do. He thereby keeps good his original tender. The other rule confers no benefit on the creditor. So he gets good money when he concludes to accept, or when the tender is enforced upon him, that is all he can ask. Why keep the same gold dollars? Others are as good as those. The other rule would needlessly harm the debtor, as it would require him to keep money idle for an indefinite time. Will we be told that he ought to pay interest because he has used the money and made interest? To that I reply that the money is his own, not the creditor's, as before the tender it was the debtor's and by refusal to accept it the creditor refused to become its owner. The interest upon it is not the creditor's because it is not his money, and also because by the tender the debtor does all in his power to execute his promise to the creditor, and the creditor's wrongful refusal of the tender ought not to give him legal or moral claim to interest produced as well by the talent of the debtor as by the money. We will be misled in this matter by the general language of the books in treating of tender, as in many instances they seem to imply that the thing tendered (the same) must be brought into court; but when we come down to the very point (that is, the identical money) they do

not mean that. The forms of the plea of tender never aver that the money brought into court with the plea is the self-same, identical money tendered, but is the same sum or amount of money tendered. That is their import. 2 Saund. Pl. & Ev. 835; 2 Chit. Pl. 431, 469, 601, 661; 5 Rob. Pr. 952, 953; 1 Barton, Law Pr. 493. A rule requiring the keeping of the same silver or gold dollars would be inconvenient and unnecessary. That the identical money need not be kept is held pointedly by *Colby v. Stevens*, 38 N. H. 191; *Curtiss v. Greenbanks*, 24 Vt. 536. The case of *Bissell v. Heyward*, 96 U. S. 580, holds a contrary doctrine. It holds that a tender, to stop interest and costs, must be kept good, and ceases to have that effect if the money is used by the debtor for any other purpose. When we analyze the case, we find it unsatisfactory and not well considered on this point, as the opinion simply asserts said proposition, and cites *Roosevelt v. Bank*, 45 Barb. 579; *Gilcs v. Hart*, 3 Salk. 343; *Sweatland v. Squire*, 2 Salk. 623. Turn to these cases. The case cited from Barbour is productive of mischief by the syllabus, that "if after tender made the money is used by the debtor in his business, and mingled with his other money, the tender is not valid." It is unwarranted by the opinion, as the judge delivering the opinion says, not that it is law, but that "it may be doubted whether a tender is good when it appears that the money tendered was afterwards used by the debtor in his own business. He is to keep the money always ready to pay when demanded, and when bills are tendered in payment and not objected to, the same bills should be brought into court. This would not be necessary to discharge a lien, but it might be to deprive a creditor of interest." He cites *Kortright v. Cady*, 21 N. Y. 343. How that case supports such a proposition I do not see, holding, as expressed in the syllabus, that "tender of the money due upon a mortgage, at any time before foreclosure, discharges the lien, though made after the law day, and not kept good; and where the tender does not discharge the debt, but only defeats a particular remedy, it is unnecessary to show continued readiness to pay or bring the money into court." The two old English cases cited in the supreme court do not

touch this point. *Giles v. Hart*, 3 Salk. 343, holds that, "in debt on bond to pay a certain sum on a day, there a tender on the day and *semper paratus* is a good plea, but not in *assumpsit*." In *Sweetland v. Squires*, 2 Salk. 623, the plea was a tender of so much, but the court held that as there was a breach of contract, and no damages or interest for time from breach to tender was included in tender, it was not good. The case of *Shumaker v. Nichols*, 6 Gratt. 592, may be said to look the other way, as it holds that a tender in payment of a judgment will not authorize the quashing of an execution, unless the tender is followed by payment into court and a motion to enter satisfaction. This is correct. It was an execution. The court has control of its execution. It ought not to be quashed, except on payment. It was a case still pending as to payment; just like a plea of tender before judgment, it must have the money with it. But, at any rate, this does not decide that it must be the identical dollars tendered. It further holds that a tender will not justify a court of equity in stopping execution, when it is not alleged or proven that the party kept the money on hand for discharge of the judgment. This is only a reiteration of the old doctrine that the plea must aver a "*tout temps prist et encore prist*"—at all times ready, and still ready, to pay. It does not hold that the very same money must be kept isolated and distinct after tender. The Virginia case of *Downman v. Downman*, 1 Wash. (Va.) 26, supports the view of the majority, as it holds that where money is tendered which is legal tender at the time, but not so afterwards, the plea of tender ought to either bring in the very money tendered, or else money which is legal tender at the date of the plea.

DENT, JUDGE, (Dissenting):

It was over eighteen years from the time of the tender in this case until this proceeding was instituted. Yet there is no allegation, evidence, or even a pretense that the tender, after being made, was kept good during all these years, so as to relieve the plaintiff from the payment of interest. His motion was an equitable one, and to sustain it he who asks

must show that he has done equity. "The obligation to keep a tender good is as essential to its legal efficacy as the tender itself." *Burlock v. Cross*, 16 Colo. 162 (26 Pac. 142.) "A tender to prevent the running of interest must be continuing. Using the money, after refusal by the creditor to receive it, destroys this necessary attribute of a legal tender." *Gray v. Angler*, 62 Ga. 596. "Tender must be kept good in order to stop interest." *Angler v. Clay*, 109 Ill. 487; *Peugh v. Davis*, 113 U. S. 542 (5 Sup. Ct. 622); *Sanders v. Bryer*, 152 Mass. 141 (25 N. E. 86). A large number of authorities to the same effect will be found in 25 Am. & Eng. Enc. Law, p. 922, note 3, and *Id.* p. 926, note 1. Further comment is unnecessary, and entirely useless. It is sufficient, however, to add that in none of the authorities referred to by Judge English to sustain his opinion is there any discussion of the question of interest, further than to state that a proper tender stops the running of interest.

Since writing the above I have read the note prepared by Judge Brannon. His claim is that, after a tender is once made, it is not necessary to keep the same money on hand, but the money belongs to the one making the tender, and he may use it after it is refused, and can not be required to pay interest on it. As in this case, the plaintiff, having kept the money for eighteen years, had the right to use it, and the interest or profit belonged to him, and all he had to do at the end of the time was to bring forward the principal; yet, by his own acknowledgment, for all these eighteen years he owed the debt. The only reason the law excuses him from paying the interest on the amount is because he has lost the use of it, as he has had to keep himself ready at all times to make his tender good. While he is not required to keep exactly the same money, yet he is required to keep the same sum or amount, and thus he loses the use of it, and is excused from payment of interest thereon. Otherwise, if he uses it he should pay interest on it; for, though it is his money, the debt against him still exists, and he is permitted to the extent of that indebtedness to use a sum of money which does not belong to him, and it is the same thing as though he had borrowed the money. In the case of *Pulsifer*

v. *Shepard*, 36 Ill. 513, it is held: "A tender, to be available, must be kept good." "Under a plea of tender, the burden of proof is on the party pleading it." And in *Stow v. Russell*, *Id.* 18: "If a creditor refuses money tendered by a person having the right to make the tender, interest will cease to run from the time of the tender, if the debtor keeps the money continuously ready, and makes no profit by it." In *Tuthill v. Morris*, 81 N. Y. 94, it is held: "The most that can equitably be claimed by the mortgagor is relief from payment of interest and costs subsequent to the tender, and to entitle him to this he must keep the tender good from the time it was made." And in this case all that this plaintiff could claim was relief from the payment of interest and costs subsequent to the tender, and, to entitle him to this, he should show that he kept the tender good from the time it was made, or pay his sister, defendant, interest on her money which he had been using eighteen years. Any other conclusion is plainly unjust, and contrary to the law of this case.

CHARLESTON.

DEMPSEY v. BOARD OF EDUCATION OF HARDEE DISTRICT.

Submitted June 24, 1894—Decided December 15, 1894.

SCHOOL BOARD—MANDAMUS—LEVY.

A school board can not be compelled, by mandamus, to make a special levy for the payment of illegal orders, or other evidence of debt issued by it contrary to section 8, art. X, of the constitution, and the laws enacted in pursuance thereof.

Z. T. VINSON for plaintiff in error, cited Code c. 104, s. 19.

DENT, JUDGE:

This is a proceeding by *mandamus*, instituted and carried on by the administrator of William A. Dempsey, deceased, to compel the board of education of Hardee district, of Logan county, to lay a levy to pay the

following drafts drawn on the sheriff of said county by said board, to wit:

"DRAFTS."

"No. 16. Hardee District, Logan Co., W. Va., January 1st, 1875. On or before the 1st day of April, 1875, the sheriff of Logan county pay to the order of Wm. A. Dempsey three hundred and fifty-six 07-000 dollars, with interest from date, and charge to special (1874) fund of Hardee district. By order of the board of education. Thos. Webb, President. Ira Evans, Secretary. (The above draft must specify what fund is meant,—whether building or school fund.)"

Indorsements on back of said order:

"Presented for payment Jan. 18th, 1876, and no funds in my hands to pay said order. G. W. Taylor, S. L. C."

"No funds in my hands, and no arrangements to pay within claim. Dec. 3, 1883. R. W. Peck, S. L. C."

"No. 17. Hardee District, Logan county, W. Va., January 1, 1875. On or before the 1st day of April, 1876, the sheriff of Logan county pay to the order of W. A. Dempsey three hundred and fifty-six 07-100 dollars, bearing interest from date, and charge to special (1875) fund of Hardee district. By order of the board of education. Thos. Webb, President. Ira Evans, Secretary. (The above draft must specify what fund is meant,—whether building or school fund.)"

Indorsement on back of said order:

"No funds in my hands, and no arrangements to pay within claim. Dec. 3, 1883. R. W. Peck, S. L. C."

No. 18. Hardee District, Logan County, W. Va., January 1, 1875. On or before the 1st day of April, 1877, the sheriff of Logan county pay to the order of W. A. Dempsey three hundred and fifty six 07-100 dollars, bearing interest from date, and charge to special (1876) fund of Hardee district. By order of the board of education. Thos. Webb, President. Ira Evans, Secretary. (The above draft must specify what fund is meant—whether building or school fund.)

Indorsement on back of said order:

"No funds in my hands, and no arrangement to pay within claim. Dec. 3, 1883. R. L. Peck, S. L. C."

These proceedings began in August, 1884, and were continued by amendments, *etc.*, until the 26th day of October, 1891, when the Circuit Court finally determined the matter, and gave judgment for the defendant. The following defenses were interposed: First, That the drafts were *ultra vires*, illegal, null and void. Second, The statute of limitations. Third, Procured by fraud, the payee being a member of the board of education. Fourth, Issued in lieu of other orders, which had been provided for and paid out of former levies, which levies had gone into the hands of the payee, as deputy sheriff of said county. Fifth, That the sheriff had defaulted to the amount of the orders to the district, which had obtained and held an unpaid decree against him, he being insolvent.

The very first question presents itself, whether a board of education can be compelled by *mandamus* to pay any order issued by it against the sheriff. Section 37, chapter 45, of the Code provides: "When any order of the board upon the sheriff of the county or judgment or decree has been presented to such sheriff without obtaining payment, payment thereof may be enforced by the Circuit Court by *mandamus* or an order for a specific levy on the property taxable in the district." The same provision was in section 37, chapter 123, Acts 1872-73. This section must be construed together with section 8, article X, of the constitution, which forbids the contraction of any indebtedness on the part of any board of education without first having submitted all questions in relation thereto to a vote of the people. This section has been construed by this Court, in so far as county courts are concerned, and the same construction will apply to boards of education. *Davis v. County Court*, 38 W. Va. 104 (18 S. E. Rep. 373). It also must be construed along with section 45, chapter 45, Code, and also Acts 1872-73, which is in words as follows, to wit: "It shall not be lawful for the board of education of any district, or independent school district, to contract or expend, in any year, more than the aggregate amount of its quota of the general school fund, and the amount collected from the district, or independent school district levies of that year, together with any balance remaining in the hands of the sheriff or

collector at the end of the preceding year, and such arrearages of taxes as may be due such district or independent school district." This provision of the law was obviously made in compliance with the section of the constitution *supra*. Taking these provisions of the law together, and it is plain that the board of education has no authority to issue any evidences of debt whatsoever, but only to issue orders on the sheriff, in any year, limited to its "quota of the general school fund, and the amount collected from the district, or independent school district levies of that year, together with any balance remaining in the hands of the sheriff or collector at the end of the preceding year, and such arrearages of taxes as may be due such district or independent school district."

If the amount of the order, when issued by the board, is already in the hands of the sheriff, in accrued funds, or taxes levied but not collected, the board can not be commanded to provide a fund for the payment of such order, for it has already done so in the manner provided by law; but if there are no funds or levies in the hands of the sheriff, or provided for by said board, at the time of the issuance of such order, the same is issued without authority and in disobedience of the law, and operates as a contraction of a debt in obedience of the constitution, and is *ultra vires*, null and void, and *mandamus* will not lie to compel its payment.

To hold otherwise would be to say to the board: "It is unconstitutional and unlawful for you to contract a debt, and issue the evidence thereof; but, if you do so, we will compel you, by *mandamus*, to pay it." This would be lending the aid of the court to break down and destroy the constitution, and the laws made in pursuance thereof. The true meaning of the clause of section 37, chapter 45, of the Code, heretofore referred to, is that, if the sheriff fails to pay an order properly issued by the board of education, he may be compelled to do so by the *mandamus*; and, if the board fails to provide for judgments and decrees rendered against it, it may be required to make a specific levy for the purpose. Wherever an order is drawn on the sheriff by the board, it is to be presumed that he has funds or tax levies in his

hands liable for the payment of the same; but as soon as it is made to appear that such is not the case—which must be always alleged and shown in a *mandamus* proceeding against the board—the order becomes an illegal debt, and its payment can not be enforced. *Mandamus* will not lie to compel the doing of an illegal act. High, Extr. Rem. § 354; 14 A. M. & Eng. Enc. Law, p. 168; *State v. Yeatman*, 22 Ohio St. 546; *People v. Village of Hyde Park*, 117 Ill. 462 (6 N. E. Rep. 33).

The drafts in controversy were issued by the board when there were no funds in the hands of the sheriff for their payment, but they were to be paid out of future levies. This was a clear violation of duty on the part of the board, and the creation of a debt against the district without authority so to do. If the sheriff had the funds to pay these orders, the remedy was to proceed against him; otherwise they were illegal. It matters not that these drafts were issued in lieu of other orders. The board of education was not authorized by law to fund its floating indebtedness, and make it continual or permanent. The only authority it had was, if it was legal, to provide for its payment by levy.

It is therefore plain that the *mandamus* applied for in this case was properly refused, and the judgment complained of is affirmed.

CHARLESTON.

FLOWERS v. FLETCHER.

Submitted June 12, 1894—Decided December 15, 1894.

1. EVIDENCE.

In a controversy over a disputed paper, evidence which tends to impeach the truth of the matter contained in such paper is admissible.

2. EVIDENCE—HANDWRITING.

To render a person a competent witness to testify as to the handwriting of another, it is not sufficient to show the receipt of friendly letters purporting to come from such person alone, but

40	103
64	297

some admission or acquiescence equivalent to an acknowledgment that she was the writer of such letters must be shown on the part of such person, independent of their receipt and contents.

3. EVIDENCE—REVERSAL.

A judgment will not be reversed because of the admission of improper testimony plainly not prejudicial to a fair trial of the case.

JOHN BASSELL and W. SCOTT for plaintiff in error, cited Anderson's Law Dictionary, Title: "Seduction"; 33 W. Va. 40-57; 29 Gratt. 255; 31 Gratt. 855; Greenleaf on Evidence, Vol. 1, § 577; Anderson's Law Dictionary, word "Hand-writing"; Rice on Evidence, Vol. 1, page 340.

DENT, JUDGE:

Plaintiff instituted an action of *assumpsit* against the defendant in the Circuit Court of Harrison county for breach of marriage contract. Defendant pleaded *non-assumpsit* and accord and satisfaction. Afterwards he withdrew the general issue, and the case was tried on the special plea, resulting in a verdict and judgment for five hundred dollars in favor of plaintiff. The defendant, not being satisfied, brings the case to this Court.

The motion for a new trial and the combination bill of exceptions and certificate of evidence are seriously open to the objections pointed out in the cases of *State v. Harr*, 38 W. Va. 58 (17 S. E. Rep. 794) and *Gregory's Adm'r v. Railroad Co.*, 37 W. Va. 606 (16 S. E. Rep. 819) and contravenes the rule laid down in the fourth syllabus of the former case, which is in these words: "To make available in the appellate court an objection taken during the trial to the admission of evidence, the point must be made and properly saved by some bill of exceptions. It is not enough merely to note the objection and exception in the certificate of evidence." It is true that the motion for a new trial is based on the grounds, as set out in the court's order, of the "rulings of the court during the trial in excluding certain testimony offered by the defendant, and permitting the introduction of certain testimony offered by the plaintiff;" but this is too general. See *Gregory's Adm'r v. Railroad Co.*, *supra*, and in

cases therein cited, and commented on in the opinion of Judge Brannon. During the progress of a hotly contested trial, innumerable exceptions are taken to the rulings of the court, depending entirely on the ignorance, experience, and ability of the lawyers engaged. Many of these are very trivial. Others may be of great moment, and the trial judge has the right to have his attention especially called to the points on which the parties rely, and not be required to go over the whole evidence and search them out for himself, or for the parties to be in a condition to base their motion on certain rulings in the Circuit Court, and then rely on entirely different rulings in this Court. While this is a case in which the rule could be applied, yet it is probably better to waive it, and decide the case on the merits, rather than give room for the complaint of a too strict enforcement of a rule, be it ever so efficacious.

In this case numerous exceptions are taken to the rulings of the court, both as to the admission and refusal to admit testimony. It does not appear whether any of these are waived; so the duty devolves upon the court of going over, reviewing, and weighing all these exceptions, to ascertain whether the defendant has been prejudiced thereby. The defendant's plea of accord and satisfaction is founded on a paper writing, in words as follows, to wit: "Received March 5th, 1892, of Jackson Fletcher, fifty dollars, in full of all claims, demands or rights of action, at law or otherwise, that I may now have against said Jackson Fletcher for breach of promise to marry, or that I may now have against said Jackson Fletcher to proceed against him, by virtue of the laws of the State of West Virginia, for the support and maintenance of any child with which I may now be conceived or may hereafter be delivered. It is expressly agreed between myself and said Fletcher that this writing is in no wise or sense an acknowledgment by him that he is the father of any child with which I have been or am now conceived, or that he has promised to marry me, but only because that I desire to relieve him of any charge of that kind that may be made because he has been in my company. Inahy Flowers, Seal. Luticia Flowers, Witness." Plain-

tiff filed a special replication, denying the execution of this paper and the receipt of the money as therein recited, under oath. The jury were impaneled to try the issue made upon this plea, and at the same time execute the writ of inquiry awarded.

The defendant objects, first, because the court allowed testimony to go before the jury tending to show that he, after the plaintiff became pregnant, furnished and wanted her to take medicine that would produce a miscarriage, and which she refused to take. He insists that this evidence was not admissible for any purpose, and only served to prejudice him in the minds of the jury. It is possibly true that this evidence was not admissible in aggravation of damages and the admitted promise of marriage and seduction, but it was admissible to contradict the truth of the paper on which the defendant was relying, and thus tend to sustain the non-execution of the paper by the plaintiff. While the plaintiff, by his plea, admits the promise of marriage, he files and relies on, in satisfaction of it, a paper in which the plaintiff is made to admit that no such promise was ever made, and the defendant was not guilty of her seduction, nor the father of her unborn child, and for which truthful admission on the part of the plaintiff he is willing to pay her the sum of fifty dollars. Thus, he is made to appear before the jury, generous to a fault, and a badly-treated man. There is no better way to discredit a paper than to show its falsity. And the fact that defendant wanted to destroy the fruit of his unbridled lust was proof positive that the paper was a written falsehood. The withdrawal of his plea of *non-assumpsit* was, in legal effect, an admission of his promise to marry, and yet he still had the denial of that promise before the jury in his plea of accord and satisfaction, contained in the paper filed as a part thereof. No doubt, that plea was withdrawn for the very purpose, if possible, of preventing any evidence being introduced of his duplicity, and thus prejudicing him in the minds of the jury, contrary to his written release and certificate of character.

Defendant next objected to the evidence of Truman Gore. His testimony was to the effect that he was present at the

parties, is competent to testify as to the handwriting of his home of defendant's mother while the plaintiff was living with her, and, when he went to leave, defendant invited him back, and said, when he came back he (defendant) expected to have a housekeeper of his own, but mentioned no name. This undoubtedly showed that defendant was contemplating matrimony at the time, but how that could prejudice his case it is hard to perceive, especially when, by his pleading, he admits that his mind was running in that direction. His plea appears to have been for the purpose of preventing any proof on this subject, but how was the jury in such a case to execute the writ of inquiry and arrive at the damages. They were entitled to full information, to enable them to reach a proper verdict. This language was used in the presence and hearing of plaintiff, to carry out his deceitful conduct towards her, and is in full accord with his wicked scheme to satisfy his uncontrolled passions, and then cast aside his deluded victim.

The next two objections are to the refusal of the court to admit the testimony of the witnesses A. W. Barnes and John Johnson, as to the genuineness of the signature to the paper in controversy. The law is that a witness who has any personal knowledge of a signature in controversy, however slight, has the right to give his opinion, and the weight of that opinion is a question for the jury, and not for the court. A witness who has seen a person write but once, and then only his abbreviated signature, may testify regarding the same; or if he has seen a signature admitted by the owner to be genuine. *Rogers v. Ritter*, 12 Wall. 322; *Pepper v. Barnett*, 22 Gratt. 405; *Cody v. Conly*, 27 Gratt. 313; 1 Greenl. Ev. § 577. But he must have some knowledge, and the mere fact that he has received letters purporting to be from the person whose signature is in controversy is not sufficient, unless there has been some admission or acquiescence equivalent to an acknowledgment on the part of the supposed writer, other than the letters themselves, that said letters are genuine, and in the handwriting of the person from whom they purport to come. A person who has had business correspondence with another, acted upon by both

correspondent, although he may never have seen him write. But where the letters have no relation to business transactions, but are letters of mere friendly or polite intercourse, some acknowledgment of handwriting, in some way other than the letters themselves, on the part of the supposed writer, must be shown. The knowledge of the witness must be founded in some other means than the receipt and contents of the letters. 9 Am. and Eng. Enc. Law, 271. The testimony of the witness Johnson was to the effect that he had known plaintiff for fourteen or fifteen years; did not know whether he had ever seen her write; corresponded with her about fourteen years ago, received about a dozen letters in answer to his own, with her name signed to them; had received no letters recently; had some of the letters with him. The question was then propounded to him: "From your knowledge of her handwriting, derived from having received letters from her, would you know the plaintiff's signature?" The court refused to allow this question to be asked, and rightly so, for the law answers this question that the witness could not know her handwriting from the mere fact that he had received letters purporting to come from her. His knowledge must be extraneous to the letters, sufficient to raise a presumption that the letters were not only from, but written by, the person whose name was signed to them.

A. W. Barnes testified that he was acquainted with the plaintiff; had known her since 1879; corresponded with her; received letters from her about four years ago, not all in the same handwriting, and were from different places; talked with her afterwards about the contents of the letters. The question was propounded to him: "State from your knowledge of her handwriting, derived from letters received from her, you believe the signature, 'Inaby Flowers,' to this paper, is plaintiff's handwriting." This question was bad, for the same reason as the one propounded to the other witness, and the court properly sustained plaintiff's objection to it. But there was still a further objection to this witness, and that is that he states the letters were in different handwritings. His evidence would therefore not have been admissi-

ble, unless he had shown that the plaintiff had pointed out and acknowledged which of the letters were in her handwriting; for it is not the receipt of nor the sending of the letters, but the handwriting, that is in controversy. A cashier of a bank who had, in the course of business, paid out a great many checks drawn on the bank, was held to be incompetent to testify as to the drawer's handwriting, because among them were some forged checks, which he had honored and paid along with the rest. *Brigham v. Peters*, 1 Gray, 139. Having received various letters in different handwritings purporting to come from the same person, how was the witness to know, never having seen her write, which of the letters were in her handwriting? And, not knowing this, how was he to acquire from them such knowledge of her handwriting as to make him competent to testify concerning the same? To ask the question is to answer it.

The next objection urged is that the court admitted the testimony of Samuel Davis that about the 1st of March, 1892, wishing to employ plaintiff to live with him, he sent a boy to her father's house for her, and he returned with the information that she was not there. This was certainly improper hearsay testimony, but it amounted to nothing, and could not possibly have had any weight with the jury. About the 1st of March is very indefinite, and would mean any time from the 1st to the middle of the month, and that she was absent from home does not mean that she had gone to Moundsville or any place particularly for any time. It is clear that this evidence did not affect the result in any manner, nor was the defendant prejudiced thereby. To reverse a judgment on account of the admission of objectionable testimony, there must be at least a doubt of its prejudicial character towards the exceptant. *Taylor v. Railroad Co.*, 33 W. Va. 40 (10 S. E. Rep. 29).

The next objection is to the refusal of the court to admit the testimony of John T. Williams that the defendant showed him the paper in controversy on March 4, 1892, and got some money changed, and said he was going over to the house of George Flowers to pay the plaintiff money, and have her sign the paper. This was strictly hearsay testi-

mony, and not admissible as part of the *res gestae*, but has the appearance of being manufactured by the defendant. A man in ordinary circumstances who is going to pay another fifty dollars will hardly need to get money changed for the purpose. Even fifty dollar bills are rare in the country. If he was only going to pay her eleven dollars, as testified to by the plaintiff, he might need change, but hardly to pay the larger sum.

The defendant's last assignment is founded on the refusal of the court to set aside the verdict and grant him a new trial. The case, in short, is to the following effect: About the 1st of March, 1891, the plaintiff, a humble country girl, went to live with defendant and his mother, he being a widower. He immediately began to show her attention, and, under the promise of marriage, seduced her, telling her at the same time: "It did not matter if they did do that way, as they were going to be married anyhow. Others had done so, and people had thought nothing the less of them." He continued this treatment of her until she became pregnant. Then he renewed his promises to marry her, and continued them up until February, 1892, when he finally refused to marry her, as he had become engaged to another. Admitting this to be true, defendant claims to have obtained from her whom he so shamefully treated, for the sum of fifty dollars paid, the certificate of innocence filed with his plea in this case. The jury, sustained by a decided preponderance of testimony, found against him on this plea, and assessed the plaintiff's damages at five hundred dollars. How the jury arrived at such sum from the evidence it is hard to tell, unless, owing to the defendant's pecuniary circumstances and inability to pay, a verdict of five hundred dollars was considered equally as valuable as one for five thousand dollars. Our law affords no adequate remedy for wrongs of this character, and this action, almost obsolete, is seldom resorted to except by the poor and friendless. The ordeal of such a trial is too great for the sensitive natures of the injured female and her relatives, who shrink from having her shame exposed to the idle and vicious gaze of the miserable hangers-on of a noisome court room. Owing to the impo-

tency of our law, fathers and brothers, and even the betrayed, in her desperation, have too often had to assume the unwelcome role of self-appointed executioners, and demanded immediate reparation or the life of the seducer. Killing under such circumstances has invariably been excused by the juries of our own and all other countries as justifiable homicide, the law of the land to the contrary notwithstanding: thus vindicating the righteousness of the most ancient of all laws on this subject, as promulgated by the greatest of all human lawgivers. His penalties, in the light of modern civilization, appear extremely harsh, but, if they were now the law of the land, virtue would be exalted where none now exists, and the brazen, polished libertine, whose unfortunate and heartbroken victims go to swell the ranks of crime, and fill our houses of infamy, would no longer be held in check his unhallowed passions in obedience to the dread of punishment in some degree at least commensurate with his offense.

Of the judgment in this case the defendant has no reason to complain, and it is therefore affirmed.

CHARLESTON.

HINKSON v. ERVIN.

Submitted June 7, 1894—Decided December 15, 1894.

1. PARTNERSHIP—EVIDENCE.

Stronger evidence of the existence of a partnership is required between partners than by third persons.

2. PARTNERSHIP—BURDEN OF PROOF.

Under a bill for settlement of partnership account, the burden of proof is on the plaintiff; and if he can not furnish sufficient evidence to establish a partnership, and also to enable the commissioner to state a partnership account, his suit necessarily fails.

3. ACCOUNTING.

A court will not undertake to adjust the rights of parties with-

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41	636
40	111
46	738

40	111
64	385

out satisfactory means of ascertaining what their rights are, and when an account can not be safely stated, and the true balance between the parties ascertained.

4. DEPOSITION.

A deposition of a party read on the hearing in the Circuit Court can not be ignored or suppressed from the hearing of an appeal in this Court on the ground that since the decision in the Circuit Court the adverse party has died.

J. B. SOMMERVILLE for appellant, cited 19 W. Va. 274; 24 W. Va. 595.

J. O. PALMER for appellant, cited 20 W. Va. 244; Bates on partnership, Sections 1, 18, 26, 27, 38, 947; 17 Gratt. 321; 50 Iowa 325; 4 Gill. 383; 30 N. J. Eq. 254.

H. C. HERVEY for appellee, cited 3 Tenn. Ch. 223; 17 Ore. 441—21 Pac. R. 556; 1 So. R. 527; 18 Fla. 131; 81 Va. 432; 3 Del. Ch. 307; 1 Mackey (D. C.) 21; 48 Md. 223; 30 N. J. Eq. 187; 55 Iowa, 11.

W. P. HUBBARD for appellee, cited 24 W. Va. 414; 5 Harr. 115; 1 Green. on Ev. 564; 12 Leigh 617; 17 Gratt. 321, 335; 30 N.J.Eq. 187; 6 Otto 611; 2 Sto. Eq. Jur. § 1520; Amb. 645; 1 Pom. Eq. Jur. § 418; 23 W. Va. 108; 2 H. & M. 603; 34 W. Va. 217; 10 Cent. Rep. 193, 199; 18 W. Va. 693, 747-52; Code c. 130, s. 23.

BRANNON, PRESIDENT:

This was a suit in equity in the Circuit Court of Brooke county by W. T. Hinkson against John Ervin to settle a partnership for dealing in grain, live stock, and other farm products, Hinkson claiming a liability in his favor against Ervin. The Circuit Court entered a decree that the equities were with the defendant, and dismissing the bill, and Hinkson appeals.

Ervin flatly denies the existence of a partnership, and this issue meets us at the front door of the case.

The burden is on him asserting the partnership to prove it, and to prove a partnership the evidence must be stronger between partners than when third persons assert it. *Robinson v. Green*, 5 Har. (Del.) 115.

There are some circumstances indicating a partnership, but they indicate only; they do not prove it. If taken alone, they would be inconclusive, and leave the question in such obscurity that I doubt whether a court could find a partnership upon them; but there are numerous circumstances of a more conclusive nature going to repel any claim of the existence of a partnership. The record from which the facts are to be gleaned is voluminous and complicated, and the evidence long and the circumstances numberless. It would be simply worse than useless to detail the evidence of facts here, since the question whether there was a partnership is purely one of fact, and the evidence and facts bearing on its solution would be applicable only in this case, and be no precedent for other cases. In opinions for publication in the Reports, details of evidence and facts, except so far as is necessary to render intelligible points of law adjudicated, are out of place. If we give facts on one side, we should give those on the other, and the Reports are cumbered with page after page of mere circumstances and facts which, after all, can perform no legal function. Opinions should give points of law and legal principles adjudicated, not endless details of evidence or even facts.

We think the evidence, as a whole, does not establish the partnership. Common rules of evidence require one seeking to recover of another to establish the elements essential to his recovery by full proof. Starkie, Ev. 586, 817-18.

Moreover, even if we could say that a partnership did exist, the plaintiff would encounter another insurmountable obstacle. A perusal of the large record will show that the means to accomplish a statement are utterly inadequate. No books of three years of quite an extensive business, covering many thousands of dollars, were kept. Little memorandum books are somewhat mutilated; some papers lost; papers claimed to bear upon the matters uncertain and incomplete. A court, to accomplish a settlement, would have to wend its way through a maze of circumstances and papers so complicated, so inconclusive and uncertain, as instruments of evidence, that any conclusion as to amount or process of adjustment would be veiled in uncertainty, leaving the mind

uncertain that it was attaining justice. If there was a partnership, the case is a remarkable one for the absence of books and papers and other means of adjustment. A court must have some safe data to guide its steps. If through negligence, bad business conduct, loss of papers, or other cause, such data are wanting, a court simply can not act. If, as I think is the case, the business done which is claimed to have been partnership was the sole business of Hinkson, or his wife by him as agent, we can account somewhat for absence of books and memorials and transactions; but it is incomprehensible that a partnership so important could have existed without papers, books, inventories, and other means of tracing its progress, ascertaining its loss or gain, or stating an account of it; and this is a powerful circumstance to repel the idea of a partnership. To make a partnership account, there must first be a general account of the partnership dealings to ascertain the profit or loss, and then separate accounts between the partners and firm. The individual account is impossible until the general account is made, as we can not tell whether a profit or loss is to be shared until we know whether there is a profit or loss. The commissioner's report in this case, finding a balance against Ervin, ignored this principle in stating no general account, to say nothing of other defects; and, in fact, this is not surprising, as I do not see how either this general account or one between the partners could be made upon any basis better than guesswork. The commissioner says the means before him were insufficient to make a statement satisfactory to himself. He says the evidence as to terms of partnership and as to profit and losses is exceedingly meager and unsatisfactory. Certain legal principles here apply. Under a bill for partnership accounts, the burden of proof is on the complainant, and, if he can not furnish sufficient evidence to enable a master to state a partnership account, his suit necessarily fails. *Maupin v. Daniel*, 3 Coop. 223. "Where there are issues as to the existence of a partnership and the state of its affairs and business, or the state of the accounts between the partners, the burden is on the plaintiff; and, if he can not furnish sufficient evidence to enable the court to state

a partnership account, his suit necessarily fails." *Ashley v. Williams*, 17 Or. 441, (21 Pac. 556.) Same effect, *Nims v. Nims* (Fla.) 1 South. 527; *Marvin v. Hampton*, 18 Fla. 131. In *Davidson v. Wilson*, 3 Del. Ch. 307, the court refused to state a partnership account because on the testimony it was impossible to state an account, and said that the court would "never undertake to adjust the rights of parties without satisfactory means of ascertaining what their rights are, and when an account can not be safely stated, and the true balance between the parties ascertained." The Maryland court said: "A court of equity will not grope its way in utter darkness, and undertake to create and establish a claim upon mere contingencies, or the preponderance of mere possibilities or probabilities, and there is no duty devolving on it to assume the impracticable task of adjusting the rights of the partners, when the proof is utterly deficient and inconclusive." *Hall v. Clagett*, 48 Md. 234. And, if any hardship fall on Hinkson, he is to blame for it. He was the active party in the business, transacting, I may say, the whole business. The moneys of the alleged firm were kept in his sole name in bank. He employed people to help in the business. He had the papers. Ervin was an old man then, beyond three score and ten, so bad in health that during the alleged partnership he was compelled to go South. He had lost his memory, was weak in mind, and considerable evidence shows that he was really not competent to transact business, and in fact, the most that can be said against him is that he seldom participated in the business. Now, it was peculiarly the duty of Hinkson, under these circumstances, to properly conduct and keep books of the business. In *Stout v. Seabrook*, 30 N. J. Eq. 187, it was held that a decree requiring a copartner to account should be denied in every case where it appears the party seeking the account has, by his *laches*, rendered it impossible to do full justice to both parties. In the above cited case of *Hall v. Clagett* it was held by the Maryland Court of Appeals that it is the duty of each partner to keep precise accounts of his transactions, and if there has been a total failure to do so, it is good reason

against an account. There were no firm assets at the close of the alleged firm. The books and papers, what there were, went into Hinkson's hands. Ervin did scarcely any business, we may say, but went South in January, 1882, about one year after the commencement of the business, and it then practically closed, though there is one check, May 10, 1884. After Ervin went South, Hinkson did all the business, as practically he had done before. The whole thing was throughout in his hands, and active, we may say sole, agency. The little that Ervin ever did was likely to save himself as surety on notes for Hinkson, who was insolvent, all the property he had doing business with being in his wife's name. There is an allegation in the bill that Ervin received and did not account for firm assets, but, as is the case with several other material reckless allegations, there is no proof of it. What was there to settle? Thus it appears that everything was in Hinkson's hands, and this justifies the application to this case of the remarks of Judge Snyder in *Sodiker v. Applegate*, 24 W. Va. 414: "The plaintiff was the person who had charge of the business, and, if there was any partnership, he was the partner to render an account, not the defendant. * * * If there were any assets or profits, they ought to be in the hands of the plaintiff as acting partner, and therefore cause of suit might exist against him for an account; but it is difficult to see why he should have occasion to sue the defendant, who had nothing to do with the management of the alleged partnership."

Finally, there is another consideration operative against Hinkson's call for an account, which, if we may not exactly rank it as *laches*, yet, mingled with other things above given, fortifies the conclusion of the Circuit Judge that the equities of the case were with the defendant. The partnership terminated January, 1882. Never did Hinkson ask a settlement of Ervin, as he himself says. No settlement was asked until asked by Everett, a general attorney in fact appointed by Hinkson, March 31, 1887, and this suit was brought in August, 1887. If Ervin owed a large sum, why did Hinkson, an insolvent and needy man, never even ask anything for so long, especially as he knew Ervin was frail and failing?

Ervin took a deed in his own name for a lot on which the business was carried on. This deed dates July 30, 1881. Hinkson claims he paid five hundred dollars on the four thousand three hundred dollars of its cost, and that the balance was paid out of firm assets, though Ervin's check shows he paid it, and Hinkson claims a half in the property. Why did he let the claim sleep so long? He knew of the deed in Ervin's name. The five hundred dollars never went on this property, but was Mrs. Hinkson's separate estate money, and the check for it was given Ervin to go on a mortgage for two thousand, five hundred dollars he held on her land. The claim that this five hundred dollars went on this lot's purchase money, and that Hinkson owned an interest in it as partnership property, is repelled by the fact, pointedly stated by himself, that the property was paid for before the alleged partnership began, and by the fact that Mrs. Hinkson demanded that Ervin credit the five hundred dollars on her debt to him. But Hinkson lets time go on without moving,—Ervin an old man, away up in the seventies, frail of body, weak and weakening of mind, his memory going, as Hinkson knew—until, after years, when Ervin had totally lost his memory of past affairs, and was far sunk in senility, so that he was found utterly incapable of giving a deposition in the case to give us his version of the matter, Hinkson brings this suit to burden Ervin, a man of very considerable means, on Hinkson's own testimony chiefly. When this suit was brought, Ervin might as well have been in his grave, so far as his capacity to defend it is concerned; for, according to the evidence of physicians and others, he was afflicted with a peculiar phase of mental disease which cast all the affairs and events of his past into the night of oblivion and forgetfulness. His mind was otherwise weak. I incline to think Hinkson's evidence incompetent, under section 23, chapter 130, Code, forbidding a party, or one interested, to give evidence of transactions had with one "insane or lunatic," both words being used. The reason for the exclusion is that one party shall not be heard if the other is insane enough to be disabled from giving evidence. But, if this is not so, it is a potent circumstance with others going to deny

relief. Hinkson delayed until the other party was incompetent to tell us his side, and now asks a decree mainly on his own evidence. He never made any demand for years, and not then, until Ervin was pressing a mortgage which he had on Mrs. Hinkson's land, and it may be that this is the fountain and mainspring of the demand sought to be asserted in this case.

We are asked to suppress or ignore the deposition of Hinkson because of the death of Ervin since this appeal was taken. No authority is cited to support the motion but *Zane v. Fink*, 18 W. Va. 747-752. We have no other authority, and do not think this supports the motion.

We are of the opinion the deposition can not be excluded in this court, because we must hear the case on the record as it was when the case was heard in the court below. Decree affirmed.

CHARLESTON.

ICE v. MARION COUNTY COURT *et al.*

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165	232

Submitted June 12, 1894—Decided December 15, 1894.

1. CONSTITUTIONAL LAW—ROAD SURVEYOR

That part of section 2, article IX, of the Constitution of the State, which provides that surveyors of roads shall be appointed by the county court, is mandatory, and provides the only mode for filling that office.

2. CONSTITUTIONAL LAW—ROAD SURVEYOR.

That part of paragraph 3 of section 56a of chapter 43 of the Code of 1891 which enacts that the surveyor of roads for each road precinct shall be elected by the people is unconstitutional and void.

JAS. A. HAGGERTY for plaintiff in error, cited Const. Art. VI, s. 39; Code 1891, c. 43; Const. Art. IX, s. 2; Anderson's Law Dict. pp. 666, 946; Const. Art. VIII, s. 24; 3 Am. & Eng. Ency. Law, p. 674, 689, n; 46 N. Y. 401; 58 Pa. St. 338.

WM. H. MARTIN for defendant in error, cited 37 N. Y. p. 428; 49 Barb. N Y. p. 9, 55 N. Y. p. 50; 35 Barb. p. 264; 65 N. C. p. 603; Cooley's Const. Lim. pp. 79, 97, 98; Cooley's Const. Lim. (4th edition) 67, 70, 72; 19 West Va. 418-19-37; 7 N. Y. 97; 5 Ind. 569; 31 Md. 204; 9 Wheat. 188; 2 Hill, 35; 8 West Va. 627.

HOLT, JUDGE:

On the 19th day of December, 1892, the plaintiff, Andrew S. Ice, a citizen and resident of the county of Marion, presented to the judge of the Circuit Court of that county his petition duly verified by his affidavit, praying a writ of prohibition, to prohibit the commissioners of the County Court of Marion county from taking bond and administering the oath of office to defendants John Beall and others named, who had been declared elected to the office of surveyor of roads in the several magisterial districts of Marion county at an election held on the 8th day of November, 1892, and in the meantime refrain from, and stay all further proceedings in the matter of taking said bonds and administering said oath of office.

As ground of the application, the petitioner set forth that the said election for the office of surveyor was without authority of law and void; that paragraph 3 of section 56a of chapter 43 of the Code (see Ed. 1891, p. 333) was and is in conflict with section 2 of article IX of the Constitution of the State. This article relates to county organization, and provides, among other things, that "coroners, overseers of the poor and surveyors of roads shall be appointed by the county court."

Under section 1, chapter 110, of the Code, the Circuit Judge awarded the rule, and the clerk issued it returnable to the first day of the following term. It was served on all the parties.

On the 22d day of March, 1893, the commissioners of the county court filed in court their return and answer, in which they set forth the facts of the election, and that the persons

named were duly and lawfully elected surveyors of roads under the statute already cited, praying that the writ may not issue.

On the 22d day of March, 1893, the case came on to be heard, and the court being of opinion that so much of the statute in question as provides for the election of one surveyor of roads for each precinct or magisterial district is unconstitutional, and therefore inoperative and void, judgment was given that the writ of prohibition do issue. And from this the defendant John T. Beall obtained this writ of error.

Article IX of the State Constitution relates to county organization. Section 1 provides that the voters of each county shall elect a surveyor of lands, a prosecuting attorney, a sheriff, and one and not more than two assessors. Section 2 provides that: "There shall be elected in each district of the county, by the voters thereof, one constable. * * * The assessors shall, with the advice and consent of the county court, have the power to appoint one or more assistants. Coroners, overseers of the poor, and surveyors of roads shall be appointed by the county court."

Section 24 of article VIII provides that "the county courts shall also, under such regulations as may be prescribed by law, have the superintendence and administration of the internal police and fiscal affairs of their counties, including the establishment and regulation of roads, ways, bridges, public landings, ferries, and mills, with authority to lay and disburse the county levies." So that from the language used, "surveyors of roads shall be appointed by the county court," from the context, the subject-matter, and the fact that it is used in a constitution, show that the language is to be taken as mandatory; for it is the province of an instrument of this solemn and permanent character to establish those fundamental maxims, and fix those unvarying rules, by which all departments of the government must at all times shape their conduct; and if directions are given that certain officers shall be elected by the people, and certain other officers shall be appointed by the county court, there is a strong presumption, from the character of the instrument,

as well as from the imperative meaning of the language used, and the context, that the provision is mandatory, and must be obeyed and observed by the legislative as well as by the other departments of the government. And one of the reasons for giving the county court such exclusive power of appointment is the fact that it is charged with the duty of establishing and regulating the county roads, and with their general superintendence, as a part of the internal police of their respective counties; so that the nature of the subject-matter lends weight to the view that the term "shall appoint" can not be read and taken as directory, for the two modes of filling these two classes of offices—one by the people, the other by the court—are exclusively and specifically applied to each office by name, and no authority is anywhere given, expressly or by necessary implication or reasonable intendment, for filling this office in any other way than by appointment by the county court, as provided for in section 2 of article IX. And, inasmuch as the mode of filling the office is provided for in the constitution, impliedly, the legislature shall not prescribe the manner in which surveyors of roads shall be elected or appointed; for, by section 8 of article IV, it is only in cases not provided for in the constitution that the legislature shall prescribe by general laws the manner in which public officers or agents shall be elected, appointed or removed. To this view the following authorities lend some weight: *People v. Raymond*, 37 N. Y. 428; *People v. Albertson*, 55 N. Y. 50; *People v. Laurence*, 36 Barb. 177. See Cooley Const. Lim. (3d Ed.) top p. 78; 3 Am. & En. Enc. Law, 680.

Thus we see some of the cogent reasons why the courts reluctantly, and only in extreme cases, feel themselves authorized to hold as merely directory any provision of an instrument, from its nature and purpose indicating that it is intended to be stable, and, unless otherwise expressed, mandatory. Although we are not warranted in holding a statute to be invalid, in whole or in part, unless we see clearly that it runs counter to some provision of the organic law—for the power of the legislature is full and free, except where limited and restricted—yet in this case that part of

the statute here brought into question seems to us to be, for the reasons given, a plain and palpable infraction of that instrument; as much so, and in good part for the same reason, as would be a statute requiring the secretary of state to be elected by the people. See article VII, section 3.

Therefore, we are of the opinion that the judgment complained of, holding so much of the alternative road law, numbered and designated in the Code (edition of 1891) as paragraph 3 of section 56a of chapter 43, as provides for the election of the surveyor of roads by the people, to be inoperative and void, is plainly right, and should be affirmed.

CHARLESTON.

THOMAS v. LINN.

Submitted June 12, 1894—Decided December 15, 1894.

1. BOND—ASSIGNMENT—DEED OF TRUST.

The assignment of a bond or note secured by deed of trust carries with it, as an incident of such assignment, the benefit of the lien of the deed of trust, unless excluded expressly or by fair and reasonable implication.

2. BOND—ASSIGNMENT—DEED OF TRUST—PARTIAL PAYMENT.

A credit properly indorsed on such bond of an unconditional payment made by the trust debtor, and so entered at his instance, extinguishes the debt and lien to that extent; but it may be erased by the express agreement of the creditor, the debtor, and the party to whom the bond is then assigned; but the question whether the benefit of the deed of trust also passes thereby, the assignment being silent on the subject, is open to independent proof.

3. BOND—LIABILITY OF ASSIGNOR.

In the absence of an express agreement to the contrary, the assignment of a bond or non-negotiable note imports a guarantee that the assignee shall receive the full amount of the bond or note assigned, if he fail to collect the same after the exercise of due diligence.

4. BOND—LIABILITY OF ASSIGNOR.

But if the amount paid for the bond is shown, that, with its interest, is the true measure of the recovery.

40	122
41	685

40	122
53	129

40	122
682	531

5. BOND—LIABILITY OF ASSIGNOR.

And he can not recover merely on default of the debtor, but only after legal recourse against him has been exhausted, unless it appears that before the bond fell due the debtor became insolvent, or from some cause a suit against him would have been unavailing.

6. TRUST FUND—TRUSTEE—PAYMENT.

Where a trustee pays a trust fund to one who receives it knowing he is not entitled, the true beneficiary may bring his suit in equity against both; but the decree should be against the one improperly receiving it as the principal debtor, and against the trustee, treated as his surety, to make good any deficiency.

C. A. SNODGRASS for appellants, cited 34 W. Va. 799.

W. S. MEREDITH and H. G. LINN for appellee, cited 26 W. Va. 710; Code, c. 126, s. 5, 6.

HOLT, JUDGE:

On appeal from a decree of the Circuit Court of Marion county, rendered against H. R. Linn *et al.* in favor of Benjamin P. Thomas, on March 17, 1893, for one hundred and sixty three dollars and fifty cents and costs. The cause was referred to a commissioner, and from his report, and the pleadings and evidence, the facts are as follows:

On the 1st day of October, 1885, Valentine Nichols sold and conveyed to A. W. Henderson, for the sum of four thousand dollars, a certain tract of land containing one hundred and fifty five acres, situate in Monongalia county, W. Va., on the Middle Fork of Dunkard creek. Henderson executed to Nichols his eight single bills for five hundred dollars each, all dated October 1, 1885, bearing interest from date and due, respectively, in one, two, three, four, five, six, seven and eight years after date; and to secure the payment thereof, on the same day, together with his wife, conveyed the land in trust to Wilson Haught, trustee. Being silent as to the terms of sale, they were determined by the statute on the subject then in force, *viz.* the act of 1882. See Acts 1882, c. 140. On the 29th day of March, 1886, the deed of trust was admitted to record; and on the 26th day of April, 1886, Valentine Nichols assigned and transferred these eight purchase money bonds to Henry Haught, but without

recourse. Such assignment was written out in full on the back, and signed by Nichols, and also signed by Haught, saying that "he accepted them as assigned without recourse." On the fifth day of February, 1887, A. W. Henderson paid Haught thirty five dollars, which was credited on the bond due one year after date. On the ——— day of ———, 1887, Henry Haught assigned and transferred these bonds to defendant H. R. Linn, to be collected, and proceeds applied in payment of a debt due from Haught to Linn. On the 1st day September, 1887, the obligor, Henderson, paid Linn the sum of four hundred dollars, which was in his presence credited on the bond first due. This money Henderson borrowed from the plaintiff, Thomas. Henderson was to lift the bond for Thomas to hold as his security. But such a proposition was not made to Linn, or to Haught, who had no knowledge of such arrangement, but the payment of the four hundred dollars was absolute and unconditional. The land is shown not to have been worth enough to pay the deed of trust, and Henderson, the debtor, had no other means of payment. (Such payment of the four hundred dollars was equivalent to getting that much on an insolvent debt, whereas an assignment would have given the assignee the first payment out of the proceeds of the sale of the land under the trust deed, and thus be to the disadvantage of the trust creditor making such an assignment, and retaining, as in this case, the other seven bonds.)

On the 21st day of September, 1887, W. E. Mallory, as attorney at law for plaintiff, Thomas, having the claim of four hundred dollars to collect for his client, B. P. Thomas, went to Monongalia county to see Henderson. He found him to be insolvent; as his farm was covered by the deed of trust, which was for its full value and more. He and Henderson then went to H. R. Linn, and Mallory, for Thomas, paid Linn one hundred and twenty three dollars and fifteen cents, the balance of the first bond, and Linn, according to his testimony, only wrote his name across the back, and delivered it to Mallory, who delivered it to his client, Thomas. The credit of four hundred dollars was erased, and on the bond

was written the following assignment: "In consideration of five hundred and twenty three dollars and fifteen cents, I hereby assign and transfer the within note to Benjamin P. Thomas. September 21st, 1887. Signed. H. R. Linn."

The facts in controversy relate to this real or apparent assignment, Mallory and Henderson testifying that the four hundred dollars credit was erased with Linn's consent, and the assignment, as written by Mallory, was signed by Linn, and all done with the consent of Henderson, who was present; whereas Linn says he did not erase the credit of four hundred dollars, did not consent to it, and does not know who made the erasure, but on the payment of the balance signed his name in blank, so that the note could be shown and delivered to Thomas as paid by him for Henderson. This bond Mallory delivered to Thomas, who notified the trustee, Haught, that he was the holder and assignee. In pursuance of notice given and of the deed of trust, the trustee, Wilson Haught, on the 10th day of February, 1891, and in front of the court house of Monongalia county, sold the land at public auction to the highest bidder on the terms that one-third was to be paid in cash, one-third in one year, and one-third in two years, with interest. Of the time and place of this sale plaintiff had actual notice. Defendant Linn became the purchaser, at the price of three thousand, nine hundred dollars, of which sum he paid ninety five dollars and eighty cents, amount of commission and costs of sale, leaving as net proceeds three thousand, eight hundred and four dollars and twenty cents, which was applied in discharge, to that extent, of the trust-deed bonds, seven in number, held by Linn. These bonds, principal and interest, on that day amounted to four thousand, six hundred and twenty five dollars and twenty five cents, and the net proceeds of sale left the sum of eight hundred and twenty one dollars and five cents unpaid. By deed of that date, viz. February 10, 1891, the trustee, Wilson Haught, by apt and proper deed conveyed the land to Linn, the purchaser.

On the 11th day of August, 1891, plaintiff, Benjamin P. Thomas, brought this suit in chancery against Hugh R. Linn and Wilson Haught, trustee, setting out the facts al-

ready stated, and, in addition, that defendant Linn, on the 21st day of September, 1887, assigned to him the bond already mentioned, setting out the assignment in *haec verba*, and making an exhibit of the bond on which it was written, charging that no part of said bond had been paid except the credit indorsed of thirty five dollars, and that the residue was due and should be paid to the plaintiff first out of the proceeds of the sale of the land; that the trustee refused to pay the same, but permitted Linn, the assignor of this bond and the holder of the others, to retain the purchase money for the payment of what was due him, in violation of plaintiff's right to be first paid, *etc.*, and he prayed that Linn and Haught might be compelled to account for the proceeds of sale, *etc.*, and for general relief. Defendant Linn answered, giving the facts as already stated, and the assignment as he claimed it. The bill was taken for confessed as to defendant Haught. Defendant Linn offered to pay and did pay into court one hundred and fifty six dollars to be paid to plaintiff, being the amount, with interest, of the sum paid to him by Mallory; protesting that he did not owe it, but was willing to pay it, *etc.*, to avoid further litigation. By order of 22nd day of November, 1891, the Circuit Court referred the cause to a commissioner in chancery, who was directed *First*, to settle the accounts of Wilson Haught as trustee, ascertain what funds had come into his hands, how he had disposed of the same, and the liens on the funds, with amounts and priorities; *second*, take such evidence as either party might desire touching the matters in issue; *third*, and report to court, together with such other matters, specially stated, as he might deem pertinent, or any party in interest require, and return with his report all evidence by him taken or read. On the 6th day of March, 1893, the commissioner filed his report, to which no exception was taken; and on the 17th day of March, the cause coming on to be finally heard on the papers formerly read and the report of the commissioner, the court pronounced the decree for plaintiff against defendant Hugh R. Linn as the one primarily liable, and the defendant Wilson Haught as his surety, for the sum of one hundred and sixty

three dollars and fifty cents, with interest and costs, with leave to sue out execution. And from this decree the appeal was allowed plaintiff, Thomas, as already stated.

"Where questions purely of fact are referred to a commissioner, his findings, while not as conclusive as the verdict of a jury, will be given great weight, and should be sustained, unless it plainly appears that they are not warranted by any reasonable view of the evidence. This rule operates with peculiar force in an appellate court, where the findings of the commissioner have been approved and sustained by the decree of the inferior court." *Handy v. Scott*, 26 W. Va. 710. Each party in his argument insists on the finding of the commissioner as correct, and as favorable to his view; so that we may infer that his statement as to the one main disputed matter of fact is either not quite full or not quite clear. As to this we shall see further on. The instrument in this case set up by plaintiff is a bond, or, more properly, a single bill, being under seal—having a scroll affixed thereto by way of a seal which is recognized as such in the body of the instrument (section 15, chapter 13 page 123, Code); but the sum to be paid is not by way of penalty, and it has no condition; hence it is properly a single bond or single bill. See *Clegg v. Lemessurier*, 15 Grat. 108. It is a specialty, and therefore non-negotiable by our decisions (See *Laidley's Adm'r v. Bright's Adm'r*, 17 W. Va. 779); and also because it is not payable at a particular bank, etc., as required by section 7, chapter 99, Code, which defines what shall be negotiable paper when payable in this state. Being non-negotiable the legal title can not pass by assignment—death alone can pass the legal title—but the equitable owner by assignment may sue in his own name at law, under our statute (see section 14, chapter 99, Code); and, whether overdue or not, the assignee steps into the shoes of the assignor, taking it subject to all prior equities between previous parties (see 1 Daniel, Neg. Inst. §§ 1-31) being in no better situation than the assignor; for the holder can only sell and transfer such interest as he has (*Stockton v. Cook*, 3 Munf. 68) but it seems not subject to any equity of a third person not a party to the bond, of which he had no notice (*Broadus v. Rosson*, 3 Leigh,

12). Where a trustee misapplies trust funds by paying them to a person who is not entitled to receive them, and the person thus receiving them knows that such payment is in violation of the trust, the trustee alone may be made to account for the misapplied funds; but the first liability is upon the one improperly receiving the funds, if before the court, and he should be decreed to refund, and the trustee be treated as his surety. See *Vance v. Kirk*, 29 W. Va. 344, 353 (1 S. E. Rep. 717). The assignor of a bond is in this State liable to the assignee, who, having used due diligence to recover the money from the obligor has failed to do so. *Mackie v. Davis*, 2 Wash. (Va.) 281. And by statute he may sue the remote as well as the immediate assignor, but not merely on default of payment of the principal debtor, but only when legal recourse against him has been exhausted (4 Minor, Inst. pt. 1, p. 26) or the debtor was insolvent, so that a suit would have been unavailing (see *Peay v. Morrison*, 10 Gratt. 149).

After the bonds had been transferred by Henry Haught to defendant Linn, the trust debtor, Henderson, on September 1, 1887, made to Linn an absolute and unconditional payment of four hundred dollars, which he caused to be and saw entered by Linn as a credit, as follows: "Benton's Ferry, September 1, 1887. Cr., by cash, four hundred dollars (\$400.00)." This fact the commissioner reports. It is conceded that this credit was properly entered according to the fact. That much cash was paid by the debtor, and received by the creditor, in extinguishment of that amount of the debt. It was an absolute discharge *pro tanto* of the obligation. Could it be resuscitated or revived? the commissioner asks. If it could not be revived, the commissioner says there remained due to plaintiff on that bond the balance, to wit, one hundred and twenty three dollars and fifteen cents, with interest from September 1, 1887, till paid, and that to that extent plaintiff, Thomas, had at the time of the sale by the trustee, a lien on the land, and on the proceeds of sale, and defendant Linn had the next lien, amounting, on 10th of February, 1891, to four thousand, six hundred and thirty dollars and sixty six cents.

Next comes that part of the report which seems to be

somewhat obscure. By some transposition and paraphrase, I take it to mean, in substance, as if it read as follows: "Your commissioner, in consideration of the evidence, is of opinion that the proofs establish the fact to be that the assignment of said bond, as claimed by plaintiff to have been made by defendant H. R. Linn, on the 21st day of September, 1887, was actually made by defendant Linn under certain circumstances, one of which is that when the assignment was made, Henderson, the debtor, had made a payment thereon of \$400, leaving at the date of the assignment only the unpaid balance of one hundred and twenty three dollars and fifteen cents capable of being assigned, if the part thus discharged by payment could not be and was not revived and restored to its original binding force as an unpaid part of the debt by the erasure of the credit of four hundred dollars." Defendant Linn received this money as being the money of Henderson. It was not paid as advanced by any one. He was not asked to receive it, and did not receive it, under any special promise or agreement that the plaintiff or any one else should be to that extent substituted to the rights and remedies of Linn, as the trust creditor under the deed of trust. Plaintiff, if he advanced the money, was then unknown in the transaction; was a stranger, under no obligation to pay; and could not and did not thereby acquire the right to be substituted or subrogated to the place of the creditor, thus to that extent paid. In fact, we may presume that the creditor, if he had known the legal effect, would not have received that amount on any such condition; for he had nothing to look to for the payment of his debt except the land, and that was confessedly insufficient. But it is said that such is the legal effect of the assignment of the first bond, which Linn did make to plaintiff on the 21st day of September, 1887, in consideration of the one hundred and twenty three dollars and fifteen cents actually paid or of the five hundred and twenty three dollars and fifteen cents recited as the consideration of the assignment. But the written assignment could not transfer that which the assignor did not have, and one hundred and twenty three dollars and

fifteen cents was all that was left of the bond. He is not concluded by the recital of the amount of the consideration, for the true consideration in such cases is open to proof; for it, with its interest, measures the amount of the recovery in a suit to recourse it against the assignor. *Mackie v. Davis*, 2 Wash. (Va.) 219; 2 Sedg. Dam. (8th Ed.) § 704. Besides, it would be but a receipt, and a receipt is but a fact open, as other facts, to independent proof. The four hundred dollars, as revived, only passed through Linn as a conduit. It really emanated from Henderson, and was assigned, in substance, as his, and for him, in payment of his debt to plaintiff. The law is well settled that, in general, the assignee for value of a bond or note non-negotiable, secured by deed of trust, although assigned without recourse (*Jenkins v. Hawkins*, 34 W. Va. 709 (12 S. E. Rep. 1090) takes the benefit of such security as an incident of the assignment (*Tingle v. Fisher*, 20 W. Va. 497); and in this state the order of payment out of the proceeds of sale is determined by the order of time of assignment, and not by the order in which the bonds fall due, unless otherwise provided expressly, or to be plainly inferred from the transaction (*Schofield v. Cox*, 8 Gratt. 533). Neither, as a general rule, can such legal effect of a written assignment be contradicted or changed by parol evidence, but the true consideration can be shown to be other than that recited in the assignment. But where the assignment constitutes only a part of the one transaction, it must be open to that extent, at least, to parol proof. *De La Vergne v. Evertson*, 1 Paige, 181. A stranger, or one who is under no obligation to pay the deed of trust, may have the right of subrogation by contract with the trust debtor, or, where it is his interest or duty to pay, he may have such right, as matter of law, so far as it does not conflict with some superior equity. But a proper unconditional payment by the trust debtor is an extinguishment *pro tanto* of the trust debt.

And this brings us to the first question here involved. Can such extinguished debt be revived, and, if so, how and with what effect on the lien? In this case, looking at it from the standpoint claimed by plaintiff to be the correct

one, the credit of four hundred dollars was erased with the consent of the owner of the bond to whom the payment had been made, at the instance and in the presence of the trust debtor, so that the creditor might assign the whole bond thus relieved of the credit to the plaintiff, which was done. It is well settled that the lien of the deed of trust could not be thus revived by the mere agreement of the trust debtor and trust creditor, as against third persons who have liens on the property. See *Marrin v. Vedder*, 5 Cow. 671; *Winslow v. Clark*, 2 Lans. 377; *Averill v. Loucks*, 6 Barb. 20; *De La Vergne v. Evertson*, 1 Paige, 181. But I know of no rule of law that forbids the making of such new contract in the way in which this one was made, except that it is liable to be scrutinized closely, and raise a demand for certainty of proof, owing to the obvious facilities it affords for fraud and abuse. I also take for granted that the benefit of the deed of trust would pass as an incident of such assignment of the debt, unless a different intent was manifest from the whole transaction; and, as the vital point—the fact and purpose of the erasure of the credit—lies in parol, such different intent may be presumed from the circumstances of the case; for the subject matter assigned is the amount of an erased credit. The avowed object of the erasure and assignment of the bond to plaintiff was that it might stand as security for a still subsisting debt due from Henderson, the debtor to Thomas, from whom the money had been borrowed to make the four hundred dollar payment. Would that object be subserved without reviving the lien of the deed of trust, which was separable from and was not a necessary part of it? Defendant Linn says in his testimony that he signed his name in blank on the note, and intended thereby to assign the same to Thomas to the extent of one hundred and twenty three dollars and fifteen cents. In such an exceptional case, it is no answer to say that he did it with his eyes open, and under a misapprehension of the law, which passed the benefit of the deed of trust, with the assignment as an incident; and he can not complain of a mistake resulting from his own ignorance of the law, but must suffer the consequences. It is the true subject-matter of the assignment

that we are looking for, and when Linn, the owner of the trust debt by his assignment, transferred the bond thus resuscitated to the plaintiff, Thomas, is there anything in the transaction to show that it was not intended that the benefit of the deed of trust was to go with it? That is the question. It is true that rules of law, as well as rules of language, may interfere to prevent a construction of the instrument in accordance with the intent of the parties (2 Pars. Cont. [8th Ed.] top. p. 498); and that, except in a limited sense, we can not travel outside the "four corners of the paper," but must take the words as there written, in their ordinary sense, as indicating the intent and incidents the law imputes. Yet it is often impossible to tell what a man has said, as to the subject-matter of the contract, until the words used have been translated into things and facts by parol evidence, thus ascertaining what he meant to say. Any relevant evidence, therefore, which fairly partakes of the nature of explanation of the subject-matter, and is reasonably calculated to place the court in the situation of the contracting parties, will, in general, be received. See Best, Ev. (Chamberlayne's Ed.) § 230, note c, and cases cited. While the subject-matter of the assignment, *viz.* the bond, can not be varied or contradicted, or even qualified, inconsistently with the written terms of the contract, yet that does not prevent the court from putting itself in the place of the contracting parties, thus placed, read the assignment, and apply it to the resuscitated bond as its proper subject-matter shorn of the trust lien, which would have been its incident in the case of an ordinary assignment; for it is by no means a necessary or inseparable incident. The erasure of the credit is not mentioned in the assignment. Such erasure, as matter of fact, when, by whom, and for what purpose done, lies in parol wholly, and is, besides, a matter about which the recollection of some of the witnesses is greatly at variance. Plaintiff sets up no claim to the benefit of the deed of trust, except as an incident of the assignment of the bond. Defendant Linn says that the credit was not erased by him, or with his consent; that he assigned to plaintiff the balance due on the bond, and no more, and delivered the bond to the agent

of plaintiff, to show how the bond and its payment stood as between plaintiff and Henderson, the debtor. Even in plaintiff's view, it was a new contract between these three parties, and, viewed by the light of all the facts surrounding it, did not have the effect, by any reasonable or necessary implication, of reviving and passing the benefit of the deed of trust as to that part which had been unconditionally and properly paid, and which was thereby discharged and extinguished.

Owing to the peculiar circumstances of the case, I have reached this conclusion, but not without great hesitation and doubt. But, however this may be, this contract as to the lien depends for its one efficient factor upon the mere fact of running a pen through a credit indorsed on the bond; and that is, at least, brought into some doubt and dispute as to reviving and passing the lien for the four hundred dollars. It is an improbable contract, except on the theory that the one who made such an assignment did not suppose it could have any such legal effect. It would be a hard bargain; taking from defendant Linn, without any but a technical consideration, a substantial part of the only security he has for the rest of his debt—a security already insufficient. The plaintiff asks what, under some circumstances, would be akin to the specific performance of a contract in the matter of the cession of a real estate security. The court would refuse such relief, unless made quite sure of its real merit, as well as of such disputed fact. The Circuit Court gave the plaintiff all he had any right in conscience at least, to ask—the money he had paid defendant Linn, with its interest; and, if it were a case of recouring the bond, the amount paid, when it affirmatively appears, is the true measure of the sum to be recovered.

Defendant assigns as cross error that there should not have been a decree against him for costs, but in this there was no error. He admitted his liability to pay the sum of one hundred and twenty three dollars and fifteen cents and interest, and offered to pay and did pay it into court, but he had not tendered it to plaintiff before suit brought. The decree complained of should be affirmed.

ON RE-ARGUMENT.

The finding of the commissioner is not excepted to. On the contrary, each party relies upon it as a finding in his favor. That part reads as follows: "Your commissioner believes, considering the evidence of W. E. Mallory, which is objected to, that the proof sustains the fact that the assignment made by the defendant H. R. Linn, as claimed to be made under certain circumstances on the 21st day of September, 1887, was actually made, but is further of opinion from the evidence that the credit of four hundred dollars on said note paid by the maker, A. W. Henderson, was an actual payment by him on said note. As to the reviving the same in favor of the plaintiff, Benjamin P. Thomas, is a question your commissioner refers to your honor for decision." The fair meaning of it is, considering evidence to which no exception was taken, that the credit of four hundred dollars was erased, and the assignment on the bond written and signed in the presence of the three parties to the agreement—plaintiff, the general creditor; Henderson, the trust debtor; and Linn, the trust creditor by assignment from Haught—but it also appears that the four hundred dollars was a payment, theretofore independently made, which extinguished the lien of the trust deed to that extent. Whether the lien could be so revived as to affect Linn's lien for the part still held by him, the commissioner submitted to the court as a question of law. There is a certain class of cases in which the lien may be revived, or, if not revived, effect may be given to the agreement to charge the land as an equitable mortgage. As a case of this kind, see *Packham v. Haddock*, 36 Ill. 38. In *Wayt v. Carwithen*, 21 W. Va. 516, the cases are examined, and the doctrine discussed by Judge Snyder, and the general principle stated as follows: "Any deed or written contract used by the parties for the purpose of pledging real property, or some interest therein, as secured for a debt or obligation, which is informal and insufficient as a common-law mortgage, but which by its terms shows that the parties intended that it should operate as a lien or charge upon specific property, will constitute an equitable mortgage, and

may be enforced in a court of equity." A mortgage, after payment, becomes *functus officio*, and neither the mortgagee, nor any one else, as a general rule, has any power to transfer it as a subsisting security, or to revive it to secure the same or any other liability. 1 Jones, Mortg. § 943; 2 Minor Inst. 365; *Pelton v. Knapp*, 21 Wis. 64; *McGivern v. Wheelock*, 7 Barb. 22. And the lien may be discharged or extinguished, and the debt remain, and the debt may be revived without reviving the lien. See *Edgington v. Hefner*, 81 Ill. 341; *Sherwood v. Dunbar*, 6 Cal. 53; 15 Am. & Eng. Enc. Law, p. 877.

In ordinary cases of assignment, the rule is well settled in this State that, unless there be an agreement to that effect, the assignor will not be permitted to come in competition with his assignee, if the proceeds of sale of the trust property are insufficient to pay the whole; and that rule the Circuit Court applied in this case to the extent of that part really owned and assigned as for himself by Linn to wit, the balance unpaid, one hundred and twenty three dollars and fifteen cents. The four hundred dollars credit was erased at the instance and for the benefit of Henderson and his general creditor, the plaintiff, and the amount then assigned for their benefit and at their instance by Linn to Thomas, in payment or security of Henderson's general debt to Thomas. Linn was the mere trustee or conduit through whom the parties giving and taking carried out the transaction, and if by implication, and without writing—for Henderson, the owner of the land, signed none—the erasure had the effect to revive the extinguished lien, it was done, in the view of a court of equity, by Henderson and for Thomas, and for their benefit, and not by or for defendant Linn. Plaintiff, in proving his case, proves this; but the case proved is by no means the case alleged in the bill. Linn had no right to the four hundred dollars that had been once paid to him by Henderson in absolute extinguishment *pro tanto* of the deed of trust. If Henderson had the four hundred dollars by erasure of the credit brought to life in Linn, it was but for an instant, as a means of transferring it to plaintiff, Thomas, in security of his unsecured debt; for all that Linn assigned as owner, all that

he owned and could thus assign, the court, by the decree complained of, gave Thomas the priority of payment. If so many points can be strained and legal difficulties be tided over, to revive an extinguished lien, or create a new equitable one, in order that plaintiff may have a lien against the land of his debtor, Henderson, for his general previously contracted debt, why may not the facts be taken as plaintiff has proved them, and his demand be thus limited, as equity and good conscience require? for he is in a court of equity, on a purely equitable demand. No rule of evidence stands in the way of getting at the truth. If there was, plaintiff himself has opened the door, and let in the light. If a parting line has to be made separating what Linn owned and assigned as his own from what he did not own but as trustee or conduit, plaintiff has drawn such line, safely distinct, showing what part of the fund is his, and what part he can not take, without overriding a higher equity than his own; and, for the same reason that plaintiff takes priority over Linn as to the part assigned by him as owner, he does not take priority as to the part assigned by Linn as Henderson's *quasi* trustee. Such limitation of the rule proves the rule by giving the reason for it, for, in showing where the rule stops, it shows why it goes thus far; for the lien of the four hundred dollars, if resuscitated at all, is the incident and accessory of that part of the debt assigned which only belonged to Linn as Henderson's trustee. What Linn did under such circumstances did not, in legal effect, by any fair intendment, operate as a waiver on his part of his right of priority over the new equitable mortgage for the four hundred dollars. See *Morrow v. Mortgage Co.*, 96 Ind. 21, 26; *Sheld. Subr.* § 248. If this case falls within the principle laid down in *Wayt v. Carwithen*, it would be because Henderson has given a new equitable mortgage on his land to plaintiff for the payment of the four hundred dollars revived by erasure for his own benefit, and the benefit of the plaintiff, his general creditor. The extinguished lien was not expressly revived, nor its revival in any way sought or mentioned expressly, when we might reasonably have expected it, or for something, at least, to have been said about the erased credit, and not leave it to stand

apparently without having had anything to do with the transaction—a dangerous proceeding and liable to great abuse—and the debt, when revived, could well stand alone, and the bond subserve a purpose, without the lien on the land. But no doubt Henderson's object was to create a new equitable lien for the debt of his general creditor, the plaintiff. Whether he succeeded in such purpose we need not discuss, for, according to the plain meaning of the general doctrine laid down in *Wayt v. Carwithen*, his equitable mortgage would only begin where the subsisting one for one hundred and twenty three dollars and fifteen cents stopped; and where the consideration was exhausted, and from that on, a court of chancery would only treat it as good and as a lien in subordination to the higher equity of Haught, Linn, and other assignees of the unpaid purchase money secured by deed of trust, and would not create for plaintiff, Thomas, or subrogate him to any lien to the manifest prejudice of those standing on higher ground. The four hundred dollars was not paid by Henderson or received by Linn with any agreement or understanding of subrogation, expressed or implied, in fact or in law, but in absolute extinguishment, thus far, of the trust debt. Haught, the mortgagee, was not a party to the transaction at all; is not a party to the suit. How do we know how defendant Linn can or will account to him as to the unpaid balance of the deed of trust? And the trust debt was thus increased in favor of a stranger to the extent of four hundred dollars, and the proceeds of the sale of the land fell short much more than that amount of paying off the trust debt. This three sided agreement between Henderson, Thomas, and Linn, put forward in the proof, and the sole foundation of any further or other relief than the relief the Circuit Court gave, is not alleged or in any way alluded to in plaintiff's bill, or in any other pleading; and Henderson, the revivor of the extinguished lien, or creator of the equitable mortgage sought to be enforced, was not and is not before the court. His name is not in the record except as a witness, nor does the bill show any necessity for making Henderson a party by reason of the tripartite contract, for that is not mentioned. Still Henderson was the owner of

the land sold under the trust deed, and interested in the distribution of the fund.

The decree not asked for, or any other than the one pronounced and complained of here, would not be justified by either the pleadings or the proof. The pleadings might have been amended, and the missing party brought in, but it was not asked for, and if given, would as far as I can see, have led to the same result. As it stands, it violates no rule of law, and though not free from doubt, does substantial justice between the parties, and ought to be affirmed.

CHARLESTON.

CANN v. CANN *et al.*

Submitted September 8, 1894—Decided December 19, 1894.

1. ADMINISTRATOR—STATUTE OF LIMITATIONS.

An administrator who presents a personal demand against his decedent's estate must show that such demand is just and valid, and not barred by the statute of limitations. The statute of limitations does not begin to run until the right of action accrues.

2. UNDELIVERED WRITING—DUE BILL.

An action or suit can not be maintained on an undelivered writing or due bill found among the supposed debtor's papers after his death.

3. UNDELIVERED WRITING—STATUTE OF LIMITATIONS.

Such writing, so found, is not sufficient acknowledgment to prevent the bar of the statute of limitations, but may, if genuine, be admissible as evidence to establish a *quantum meruit*.

4. ADMINISTRATOR—SON'S SERVICES.

Where a son, who is also the administrator of his father's estate, sues such estate for wages claimed for services rendered before his father's death, he can not recover unless he proves an express contract, or the facts and circumstances sustained by a preponderance of testimony clearly establish an expectation or intention on the part of his father to compensate him for such services.

FAULKNER & WALKER, W. H. TRAVERS and C. H. SYME
for appellant:

40	138
42	67
40	138
45	564
45	565
45	566
40	138
46	265
40	138
49	235
49	315
50	512
40	138
53	33

"A report of a commissioner unless excepted to will be presumed by the court as admitted to be correct, not only, as to the principles of the account, but as to the evidence also."—21 W. Va. 262; 22 W. Va. 159; 24 W. Va. 524.

"A party complaining of a commissioner's report must point out the errors of which he complains by exception thereto so as to direct the mind of the court to it, and when he does so the parts not excepted to are presumed to be correct," "both as to the principles, and the evidence on which the parts are founded."—14 W. Va. 531; 18 W. Va. 185; 21 W. Va. (body of opinion, page 270); 19 W. Va. 459.

Exceptions in general terms amount only to a personal allegation.—19 W. Va. 459.

Exceptions to a commissioners report must state some principle upon which the commissioner erred, or some fact, otherwise the court must disregard the exception.—2 Danl. Chan. Prac. 1315, 1316; 29 Ala. 393; 2 Sum. 108; 13 Peters 359; 21 W. Va. 271; 14 W. Va. 521; 10 W. Va. 298; 12 W. Va. 402.

Adult defendants failing to except to commissioner's report will not be permitted to impeach it, either at the hearing of the cause, or in the appellate court.—10 W. Va. 645; 8 W. Va. 218; 17 Gratt. 85; 12 W. Va. 213.

Exceptions to a commissioner's report must be stated so that the court can decide upon the equity, or legality of the principal only, upon which the article is admitted or rejected. The error must be pointed out with reasonable certainty.—2 H. & M. 422; 21 W. Va. 271; 14 W. Va. 559; 26 W. Va. 540; 25 W. Va. 417.

Where questions purely of fact are referred to a commissioner, his findings will be given great weight, and should be sustained unless it plainly appear that they are not warranted by any reasonable view of the evidence.—26 W. Va. 710; 14 W. Va. 1; 21 W. Va. 698; 33 W. Va. 160; 38 W. Va. 370; 30 W. Va. 147.

Under the prayer for general relief, the plaintiff is entitled to such relief as is agreeable to the case made in the bill though different from the specific relief prayed for.—38 Pa. St. 155; (98 Am. Dec. 248).

"Under prayer for general relief any relief may be granted

which is suitable to the case, and consistent with the allegations and proofs.”—St. Eq. Pl. § 40; 2 Rob. Prac. (old) 293, and cases therein cited; 1 Barton Chan. Prac. 267; 1 Munford 549; 2 Rand 401; 15 Gratt. 400; 17 Gratt. 85; 21 Gratt. 60; 4 W. Va. 107; 26 Gratt. 571; 8 Leigh 513; 38 W. Va. 408; 4 W. Va. 107; 22 W. Va. 404; 1 Bland, 251; 20 N. J. Equity 367; 1 Danl. Chan. Prac. 434; 1 Munford 554, note; 3 Munford 29; 19 S. E. Rep. 845. “Under the general prayer the complainant is entitled to any relief consistent with the case made, though inconsistent with the special relief prayed for.” 8 Wood 339; 18 Ala. 371; 15 Md. 82.

Statute of limitations could not apply in this case.—122 U. S. 176; 78 Va. 683; 14 W. Va. 222; Code of West Virginia, c. 104, s. 8; 1 Wood on Limitations 24 and 25; 1 Cranch 90; 1 Cranch 55; 23 W. Va. 717; 24 W. Va. 594.

If the Statute of limitations could apply (which is denied) it could only extend to the interest of the party pleading it.—3 Bland Chan. Rep. (Md.) 500, 501; Maryland Rep. 100.

D. B. LUCAS for appellees cited, 23 W. Va. 241; 33 W. Va. 574; 88 N. Y. 92; 2 Bla. Com. 511; 3 Id. 18, 19; 25 W. Va. 830.

DENT, JUDGE:

At March rules, 1883, in the clerk's office of Morgan county, Harrison Cann filed his bill in chancery against the heirs of his father's estate to enforce payment of his claim for services rendered as evidenced by a certain duebill bearing date the 28th day of April, 1880, calling for three thousand dollars for services rendered by the plaintiff “since he became twenty-one years of age.” The plaintiff made himself a party defendant to this bill as administrator of decedent.

The only appearance for the defendants is the answer of the infants Silas Largent and Elizabeth Largent, by their guardian *ad litem*, T. N. B. Davis; an answer filed by George W. Ziler, husband of one of the heirs, and an exception endorsed on the commissioner's report by the defendants Catherine Ziler, Susan E. Ambrose, and Sarah Cann. The bill is

not taken for confessed as to any of the defendants, but on service of sermons an order of reference is entered to ascertain the debts and their priorities against the estate of Jacob Cann, deceased, and the estate liable to the payment of the same. From the commissioner's report it appears that the personal estate was amply sufficient to pay all the debts against the decedent, with the exception of plaintiff's claim, and that is the only matter of controversy in the suit, without which no suit would have been necessary.

According to the law and the decision of this Court in the case of *Rader v. Neal*, 13 W. Va. 373, in this suit concerning his wife's separate estate, George W. Ziler was not a necessary party thereto, and therefore the answer filed by him cannot be regarded, as he is too remotely interested in the subject matter to contest plaintiff's claim in his own right.

The adult defendants who are proper parties to the suit did not think it worth while to contest the allegations of the bill, but contented themselves with indorsing the following exceptions on the commissioner's report: "The within report is excepted to by Catherine Ziler, Susan E. Ambrose, and Sarah Cann so far as it allows Harrison Cann a claim against the estate, amounting, principal and interest, to four thousand nine hundred and twenty-four dollars and fifty cents, all of which should be rejected as improperly allowed." The report being in accord with the allegations of the bill, to which these defendants made no appearance, but allowed it to go uncontroverted so far as they were concerned, this exception should have been disregarded by the court, or promptly overruled, as by their silence in not pleading they have admitted the justice of the claim. As to them, neither the report of the commissioner nor any proofs are necessary to support a decree justified by their confession.

It is not so with the infant defendants, who are under the protection of the court, and whose interests must be regarded and preserved by it. The plaintiff has placed himself in an anomalous, though not inequitable position by making himself, not only as the administrator of Jacob Cann, deceased, but also as the administrator of Elizabeth Largent, deceased, defendant to his own bill. If the claim on which

he sues is just beyond controversy, there could be nothing wrong in so doing, as equity readily recognizes and distinguishes between personal and representative rights, and can shape its decrees accordingly. But where the obligation of defense rests upon him in his representative capacity, equity will not permit him to make himself, in such capacity, a defendant to his own personal bill, and then treat such bill as taken for confessed as to his decedent's estate, but will require him to establish the debt claimed by him against such estate as fully and completely as though all defense that could possibly be made to such debt were properly interposed to its allowance. If this were not true, and he, by this means, secured the allowance of an illegal debt against the estate of his decedent, he would become personally liable for its payment, and so he has gained nothing by his suit. In section 5, chapter 87, of the Code, it is provided that, "if any personal representative, guardian, curator or committee shall pay any debt, the recovery of which could be prevented by reason of illegality of consideration or lapse of time, or by any other fact within his knowledge, no credit shall be given him therefor." This law applies equally as well where an individual claim of the fiduciary is presented for allowance as where a debt has been paid by him, and the duty devolves upon the court and commissioner before whom his accounts are presented to prevent the auditing against the estate of any illegal claim; wherefore it becomes incumbent on the court in this case to say whether the claim presented by the plaintiff in his personal character has been shown to be a proper charge against the estate of the decedent. The bill charges that the decedent, in pursuance of a contract made with the plaintiff to pay him a reasonable compensation for his services as a common laborer on his father's (decedent) lands, since he became twenty one years of age, executed to the plaintiff his note or due-bill on the 28th day of April, 1880, for three thousand dollars. The evidence of plaintiff shows that some time after his father's death he found this due-bill written in his father's account book. It is also shown that it was in the father's handwriting. If

this due-bill had been delivered by the deceased to plaintiff, his right to recover would have been beyond question. It not only was not delivered, but plaintiff had no notice of its existence until it came to his hands as the administrator of decedent's estate. Not being delivered, it had no binding force. *Curtis v. Gorman*, 19 Ill. 141; *Thomas v. Watkins*, 16 Wis. 549; *Prather v. Zulauf*, 38 Ind. 155. To allow it to be used as an admission or acknowledgment of an indebtedness would, in effect, make it a valid legal instrument, and hence the law requiring delivery would be thwarted. Nor can it be treated as such an acknowledgment in writing as will avoid the statute of limitations. In 13 Am. & Eng. Enc. Law, p. 760, the law is stated as follows, to wit: "To make the acknowledgment complete, it must, however, be communicated to some one; and consequently a paper which was never delivered, but was found among the debtor's papers after his death, cannot operate as an acknowledgment." Also: "A mere writing acknowledging a debt, which is retained by the person making it, and which is never delivered, either to the creditor or to any one else, cannot have the effect of preventing the operation of the statute." *Pershing v. Canfield*, 70 Mo. 140; *Merriam v. Leonard*, 6 Cush. 151.

For the purposes of this suit under the law as we find it the due-bill relied on is worthless unless it can be treated as an admission of indebtedness on the part of the decedent. In Chamberlayne's Best, Ev. 486, it is said that a written admission, void as an obligation, is admissible as evidence, although the maker is deceased, and such admission be in the form of a book entry. This appears to be consonant with reason and justice if the admission as alleged is shown to be genuine and indisputable; but where its genuineness is attacked, and it is not sustained by a clear preponderance of legal testimony, its weight as evidence is destroyed, and it should be received with the greatest caution, if at all.

The commissioner to whom the matter was referred finds in favor of the genuineness of the paper, but the court, on an examination of the evidence, overrules and disaffirms the report. Hence it devolves upon this Court to determine for

itself from the facts and circumstances disclosed by the record whether it will sustain the conclusion of the commissioner or that of the Circuit Court. *Roots v. Kilbreth*, 32 W. Va. 585 (9 S. E. Rep. 927).

Examining the evidence, we find that the following nine witnesses introduced by the plaintiff, to wit, Lewis Allen, George Blakely, J. H. Buzzard, William P. Smith, H. Clay Spohr, Edmund Pendleton, Franklin Farris, Albetto Mendenhall and J. S. Duckwall (an attorney for plaintiff), testify more or less strongly that they are acquainted with the handwriting of Jacob Cann, deceased, and that they believe the signature to the controverted paper to be his. Another witness for the plaintiff, John W. Bechtol, who was well acquainted with decedent's signature when written with a pen, testifies that he is unable to say that the signature in controversy, written with a pencil is his genuine signature. On the other hand, the following seven witnesses, to wit, William J. Fieece, Andrew J. Davis, John J. Hertzels, Jefferson Vandersoll, John Frederick, William Z. Catlett, and Joshua Ziler, testify just as strongly, and some of them even more emphatically, that the controverted signature is not the genuine signature of the decedent, and some of them give good reasons for the belief that is in them. The latter are sustained by many of the circumstances surrounding the transaction. The plaintiff himself states that, although he was looking carefully through his father's papers and books for something of the kind, he did not discover this due-bill until he had looked through this little account book three times, and not until some time after his father's death; and he never made the discovery known to his mother or sisters until he had failed to get the latter to deed him the home farm, even though he promised them to will it to their children; and they testify that they did not know it until after this suit was brought, nearly two years after the death of their father, and then their first information did not come from their brother, although he had ample opportunity to inform them. On the contrary, he did inform one of his sisters, about six months after the death of his father, that he had examined his books and papers carefully, and

could find nothing in his own favor except a credit for one hog. His concealment of this matter from his sisters, and making no claim for compensation to them for his services, until after this suit was instituted, is certainly a very strong circumstance against plaintiff's claim. In addition, Isaiah J. Smith, a witness for plaintiff, states that in the December before Jacob Cann's death, which happened in August, decedent told him "he always intended Harrison should have the home place." This was almost eight months after the date of the controverted paper. Silas J. Largent testified that some four or five months before his death Jacob Cann told him he expected to leave Harrison Cann the home place and what was on it—almost one year after the date of the paper. John Turner testifies that Jacob Cann told him the same thing, but his date is indefinite. All these witnesses approached Jacob Cann at the instance of Harrison, and the latter tried to get him to sign a paper to the effect that he would give Harrison the home farm, but he declined to do so, saying, "I will give him something to show for his work after a while." H. Clay Spohr's evidence is to the same effect.

These witnesses certainly prove that there was a persistent effort on the part of Harrison Cann to get his father to deed him the home farm, even up until his death, which the decedent just as persistently declined to do. But there was no intimation at any time to any of these witnesses that said paper writing was in existence. The consideration for any such paper is left by the evidence in very great doubt, especially when the incompetent testimony is expunged from the record. In the case of *Riley v. Riley*, 38 W. Va. 290, (18 S. E. Rep. 569), Judge Holt, quoting from 17 Am. & Eng. Enc. Law, 336, states the law governing cases of this character as follows, to wit: "But where it is shown that the person rendering the service is a member of the family of the person served and receiving support therein either as parent, child, or other near relative, a presumption of law arises that such services were gratuitous. * * * Therefore, before the person rendering the service can recover, the express promise of the party served must be shown, or such

facts and circumstances as will authorize the jury to find the services were rendered in the expectation by one of receiving and by the other of making compensation." There is no express contract proven in this case. And the facts and circumstances show that Harrison Cann lived along with his father, by his own admissions, working and farming for himself, receiving his board and clothes, and doing very much as he pleased; that he never pretended to make any charge or keep any account of his services, but that he was continuously importuning his father to give him the home place, which his father at times stated it was his intention to do.

John W. Nolan, a witness for the defendants, states "that about a year before the death of Jacob Cann he had a conversation with Harrison Cann, in which he asked him how he was getting along with his work, and he said, 'Not very well; he was doing for the old man; that the old man was not doing much for him.' I made mention to Harrison that I would talk to the old man for him. He said he didn't think it would do any good, but I could do as I pleased about that." Afterwards, he says, he fell in with Jacob Cann, and says: "I asked him if he oughtn't to do something for Tip, and he told me he had done more for Tip than any of the balance of the children. Well, he said Tip had stock on the place. He said he knowed what Tip wanted. If he would deed him the home place, he would be satisfied and that he never would do while his head was above the top of the ground. He said Tip wanted all from the other heirs; poor John, he said, especially." Tip was Harrison's nickname.

William J. Fleece testifies that about the month of March, 1880, the plaintiff stated to him that he was getting up in years, and that he had worked a long time, and had no guaranty for it, and requested him to see his father, and ascertain whether he would leave him the farm before he left the world, or make some arrangement to compensate or pay him for his work. Harrison Cann made this request twice, and then the witness says: "I went there, and found Mr. Cann there alone entirely. After talking over other things, I told

him what I came there for; that Harrison Cann, his son, requested me to come to see him; to know from him what he would leave or give Harrison, his son, if he would go to work on the farm, attend to his father's things, and have whatever he agreed to give him put in writing. He (Jacob Cann) said he would not agree to give him anything, and have it put down in writing, but he might come there and go to work on the farm as he had done. He would board him. He might have all he made on the farm except one field. That Harrison Cann had never done as much for him as his daughter Kate had. That he had paid money for Harrison, bought him clothes, and that Harrison had been working the most of the time for himself. Other things were said by him. His exact words I do not remember, but he left me under the impression that his son John was a better boy to him than his son Harrison." The witness further testified that he reported to Harrison his father's reply. This is the testimony of two uncontradicted witnesses, acting in the capacity of agents for the plaintiff. And they certainly show that Jacob Cann had no expectation of making compensation to Harrison for his services, and this fact was communicated to him; and if he had any right of suit at that time he should have brought it in his father's lifetime. James D. McCool testifies that in the month of February before his death he met with Jacob Cann, when "he commenced talking about his family and children. He said that he never intended to make a will, for, said he, 'Tip, my son, is so damned contrary. He will work for a while,' he said, 'then lounge about, and I have to keep him and his stock, and I consider him a bill of expense to me; while my girls are at home, working for the family, all the time, and I just think the laws of my state can make a better will than I can.'" This statement is not properly admissible testimony, except as a mere circumstance, in a case of this kind, involving so many grave doubts.

Taking the evidence as a whole, it is certainly a matter of impossibility to pronounce the controverted writing to be a genuine paper; but, the Court being of the opinion that neither the Circuit Court nor the commissioner has yet passed

upon the plaintiff's claim for compensation independent of such writing, and that there is evidence tending to show his right to maintain his suit on a *quantum meruit* for such compensation, and that the allegations of the bill are sufficient therefor, the decree in this case is reversed, and the same is remanded to the Circuit Court, with directions to recommit the same to a commissioner thereof, for the purpose of ascertaining, if any, what amount is legally due the said plaintiff from his father's estate for services rendered from the time he became of age until the death of his father, and that said case be further heard and determined according to the rules of law and equity.

HOLT, JUDGE (*concurring*):

The following state of facts is disclosed by this record as alleged in the pleadings proved by the testimony and found by the commissioner: The plaintiff, Harrison Cann, was born on the 15th day of October, 1840, and became twenty one on the 15th day of October, 1861. From that period up to the death of his father, on the 5th day of August, 1881, a period of twenty years, he lived with and worked for his father at his home, and unmarried, on the promise and assurance made to him by his father, who was the owner of twenty four different tracts of land, that he would leave him by will the home place of about three hundred and twenty one and three-fourths acres, and worth three or four thousand dollars. In 1879-80 plaintiff became dissatisfied about the uncertainty of getting the farm or any other compensation for his labor, and got several of his friends to talk to his father on the subject. The father told these intermediaries that plaintiff would be standing in his own light if he left home; that, if he remained at home, and took care of them, he always intended he should have the home place; that he intended to compensate him. Thus induced, the plaintiff remained with his father and mother down to their death. At the death of the father was found his book of accounts, containing thirty seven pages of items of debit and credit entered for and against some twenty five or thirty different

persons, and among them were two items of charge against plaintiff, Harrison Cann, of three hogs, at two separate times, and the following entry in the handwriting of Jacob Cann:

"1880, April 28. Due Harrison Cann, three thousand dollars, for services since twenty one years of age. Signed Jacob Cann"—all in pencil.

Jacob Cann died intestate on the 5th day of August, 1881, leaving his widow, Susan Cann, and five children: Plaintiff, Harrison Cann; John, who died intestate and unmarried since his father; Catherine Ziler, wife of George W. Ziler; Elizabeth Largent, wife of Silas J. Largent and Emma Ambrose, wife of Jesse H. Ambrose.

He left some personal property, about enough to pay all just claims except that of plaintiff, and two thousand, eight hundred and fifty seven and three-fourths acres of land in twenty four separate tracts.

Plaintiff qualified as administrator on the 31st day of August, 1881, and found in the drawer of decedent the above account book. He tried to get his sisters to convey him the home place, but they failed and refused to go on with it after three of them had signed the deed.

On the first Monday in March, 1883, he brought a creditor's bill against the heirs and administrator. In the bill is contained a specification of his claim against the estate as follows: "The plaintiff further says that from the time he became twenty one years of age, which was on the 15th day of October, 1861, up to and until his father's death, a period of twenty years, in pursuance of a contract between his father and himself, he remained with his father, and worked for him as a common laborer on his father's lands, his father promising to pay him a reasonable compensation therefor. And accordingly, in pursuance of the contract and understanding between his father and himself, his father, on the 28th day of April, 1880, executed to the plaintiff his note or due-bill for three thousand dollars, 'for services rendered him by the plaintiff since he became twenty one years of age.' " The four heirs, sisters of plaintiff, seem to have recognized to some extent the justice of plaintiff's claim, and in

performance of what the father was supposed to have promised to do went so far as to sign a deed conveying the home place to plaintiff, their brother, but for some reason refused to go on and complete it.

No one answered the bill except George W. Ziler, the son-in-law who had no interest, and he pleads the statute of limitations; but Mrs. L. Largent died during the suit, and her children, both infants, answered in 1890 (April 7th), by their guardian *ad litem*. On the 4th day of April, 1883, an order of reference was entered, referring the cause to Commissioner J. R. Smith to report the claims, hear proof, etc. The commissioner took and returned the testimony of thirty one witnesses, filing his report on the 8th day of December, 1890. He finds and reports the due-bill of three thousand dollars to be a valid claim against the estate of the said Jacob Cann, deceased, and that plaintiff is entitled to receive the same, with interest from the 28th day of April, 1880. But he further reports that "Jacob Cann was satisfied with the consideration for said due-bill when he executed the same, by naming the consideration therein, which consideration is strongly supported and established as valuable by the evidence herewith returned;" and the testimony of eight or ten witnesses, who knew his services rendered, put the value thereof at at least one hundred and fifty dollars per year for the twenty years. The report is excepted to by the two daughters and the widow. On the 27th day of November, 1891, the cause came on to be heard, and the court, being of opinion that the claim reported in favor of plaintiff was not sustained by the evidence, sustained the exception, disallowed the claim, confirmed the report in other respects, and gave plaintiff leave to file an amended bill. What amendment the court deemed necessary does not appear, but I infer it related to the due-bill. This appeal was allowed plaintiff. I propose to consider the case first on the theory that the entry found in decedent's book of accounts is not only ineffectual as a testamentary paper, but is wholly nugatory for any purpose.

First. As to the pleading. Plaintiff's claim for a *quantum meruit* against the estate is presented and set forth in

his bill explicitly, specifically, and with all the definiteness of detail of individual characteristics that the claim is capable of.

Second. Plaintiff has presented it in a court of equity, the proper forum, for he asks to have real assets descended, administered and applied in satisfaction of his claim. See Code (Ed. 1891) c. 86, ss. 3, 4.

Third. What is the nature and binding force of his claim, if made out by the proof? That there was an express agreement between his father, the decedent, and himself, that the father would devise him the "home place," or otherwise make him a reasonable compensation for his services, if plaintiff would work for decedent on his lands, and take care of him for life; that he performed his part of the contract, but his father left his part unperformed, unless the duebill found entered on his book of accounts shall be held to be an execution of the contract on the part of the father; if not, he claims compensation for what his services shall be shown to be reasonably worth.

Fourth. What is the evidence of his claim? By the testimony of at least ten witnesses his claim is proved and established, and it is proved that in performing his part of the agreement he spent twenty years of the best part of his life, that is to say from twenty one to forty one, and that the deceased accepted these services knowing that plaintiff was relying upon his promise to compensate him in some testamentary way.

Fifth. On this mass of testimony he had in his favor in the Circuit Court a *quasi* verdict in the finding and report of a patient, careful, intelligent commissioner, who knew and saw the witnesses face to face, and calls them "intelligent and unbiased." This, in my view, for the practical administration of justice, establishes the agreement and the performing of it on plaintiff's part, for such finding of fact by the commissioner of what he was directed to ascertain and report has in general great weight. Here it bears the marks of deserving what the law accords, and the claim itself bears internal marks of being deserving, and of legal obligation. I do not think that the action of the Circuit

Court has, for the purposes of this Court, done away with the findings of the commissioner, and set the matter wholly at large. That would be unreasonable. It still stands upon its own merits, whatever they may be, as the ascertainment of a fact depending on conflicting evidence, without anything to prevent this Court going into the evidence to ascertain for itself the facts and draw its own conclusions; but there is no presumption against his report merely by reason of the action of the court below. See *Roots v. Kilbreth*, 32 W. Va. 585 (9 S. E. Rep. 927). Can not the action of the Circuit Court in disregarding or overruling such ascertainment of a fact by the commissioner be appealed from and reviewed in that court, where the rule is constantly laid down? See *Oteri v. Scalzo*, 145 U. S. 578 (12 Sup. Ct. 895); *Kimberly v. Arms*, 129 U. S. 512 (9 Sup. Ct. 355); *Crawford v. Neal*, 144 U. S. 585 (12 Sup. Ct. 355); *Medsker v. Bonebrake*, 108 U. S. 66 (2 Sup. Ct. 351); *Tilgham v. Proctor*, 125 U. S. 136 (8 Sup. Ct. 894); *Callaghan v. Myers*, 128 U. S. 617 (9 Sup. Ct. 177); *Camden v. Stuart*, 144 U. S. 104 (12 Sup. Ct. 585); *Cook v. Railroad Co.* (N. Y. App.) (39 N. E. Rep. 2).

1. Silas J. Largent, a brother-in-law, and one of the defendants, says: That four or five months before his death Jacob Cann told him that if his son Harrison continued to live with him, and to do as he had done, he intended to leave him the home place and what was on it. This was said while plaintiff was dissatisfied because his father did not give him something to show for his promise. That plaintiff did continue to live with his father thereafter until the latter's death.

2. John Turner. He knew the family of decedent during the fourteen or fifteen years before his death. Plaintiff did most of the work; managed the farm. His services were worth two hundred dollars per year. Some four years before he testified, decedent, while on the home place, told him that Tip (a nickname of plaintiff) was a good fellow, and when he was gone he intended to leave him the home place and all that was on it; that all the others had left him. Afterwards there was some misunderstanding about it, and at the instance of plaintiff he saw decedent about it, to fix it

up. He told decedent that plaintiff wanted him to give him something to show for the place or his work. He replied, "I will give Tip something to show for his work after a while." This was communicated by witness to plaintiff.

3. George Dunn. Plaintiff worked on the farm steadily, fixed up the dwelling house, stables, blacksmith shop, granary, wagon shed, the fences, and put the farm in good order generally. He was a good hand, worked steady, *etc.* Was worth, managing, working, *etc.*, two hundred dollars per year. This, witness, who worked on the place, knew during a period of ten or twelve years.

4. H. Clay Spohr. Had known the parties all his life. Forty-three years of age. Been there very frequently. Decedent married his half-sister. Had conversation about the matter; the last time in 1880-81. Decedent told witness Harrison, the plaintiff, was the only one that was of any service to him, and he intended to reward him for it. He intended to give him the home place, and farming implements. He said, the last time the witness talked to him about it, that some one was trying to persuade plaintiff away from him, "but if he stays I will reward him well for it." At another time he said he would give him the home farm if he stayed.

5. Jesse Ambrose is a defendant and brother-in-law. Had known plaintiff as living with decedent for more than sixteen years, farming for his father; blacksmithing, wagon-making, any kind of work about the farm; putting in crops, gathering, threshing and saving it. He worked at carpentering—put up buildings on the farm. Farm contains about three hundred acres.

6. Isaiah J. Smith. Had been there frequently, from a day to a week at a time. Had known decedent forty four years, plaintiff twenty five years. Plaintiff was of good habits, sober and industrious. Did all kinds of work. Was worth three hundred dollars per year. In December before decedent's death (August 5, 1881,) plaintiff complained to him that he had worked a number of years without ever having received any compensation, and that he would leave home if he did not get some satisfaction for the

services he had rendered; and at plaintiff's instance he spoke to decedent on the subject. Decedent answered that plaintiff stood in his own light if he left home; that if he remained at home, and cared for them, he always intended he should have the home place; and plaintiff was persuaded, and remained till his father's death. He always found plaintiff at the head of the labor force and management of the farm. He was engaged in all kinds of farm labor, and did blacksmithing, etc., besides.

7. Adam Spring. Plaintiff, during the latter part of Jacob Cann's life, took charge of his affairs, putting out and gathering crops, and attending generally to the labor on the farm. Was worth about one hundred and fifty dollars per year.

8. Susan Cann, the mother. Plaintiff was born in 1840. Has never married, but has resided at home, doing all kinds of work; putting in and gathering the crops; a good deal of work of all kinds; made fence, built stable, corn house, granary, made plows, harrows, wagons. He was an industrious, sober boy. He has spent all his best years on the place, twenty odd years since he has been his own man.

Plaintiff's own testimony and a part of his mother's are not given because incompetent. It was disregarded by the commissioner. This has been enough to convince me that the father, a man of property, owning twenty four tracts of land, held out to the only child remaining with him to the last the inducement of testamentary compensation.

On it the son acted, and steadily, soberly, efficiently gave to his father's service the first twenty years of his manhood, reaching from twenty one well up into middle life. The father's promise miscarried. That he is entitled to a *quantum meruit* compensation, I put in evidence this long list of cases. Many of them show not only the general doctrine of legal obligation, but, what is most to my purpose, illustrate the mode, the means, and the force of what has been regarded as safe, satisfying proof in such cases: *Grant v. Grant* (1893) 63 Conn. 530 (38 Am. St. Rep. 379, note 393); *Wainright v. Talcott*, 60 Conn. 43 (22 Atl. 484); *Reynolds v. Robinson* (1876) 64 N. Y. 589; *Eaton v. Benton*, 2. Hill 576; *William*

v. *Hutchinson* (1850) 3 N. Y. 312 (53 Am. Dec. 301, 306, note); *Parsell v. Stryker*, 41 N. Y. 480; *Newell v. Keith*, 11 Vt. 214; *Johnson v. Hubbell* (1855) 10 N. J. Eq. 332 (66 Am. Dec. 773 784, note); *Hawkins v. Ball* (1857) 18 B. Mon. 816 (68 Am. Dec. 755, 758, note); *Carmichael v. Carmichael* (1888) 72 Mich. 76 (40 N. W. Rep. 173, and 16 Am. St. Rep. 528, 534, note); *Snyder v. Castor*, 4 Yeates, 353, 358; *Gary v. James*, 4 Desaus. Eq. 185; *Walker's Estate*, 3 Rawle 243; *Milier v. Lash*, 85 N. C. 51; *Shakespeare v. Mankham*, 10 Hun. 322 (72 N. Y. 406); *Raynor v. Robinson* (1862) 36 Barb. 128, 131 (28 N. Y. 494); *Quackenbush v. Ehle*, 5 Barb. 472; *Campbell v. Campbell*, 65 Barb. 644; *Martin v. Wright* (1835) 13 Wend. 460 (28 Am. Dec. 468, 471, note); *Wright v. Tinsley* (1860) 30 Mo. 389; *Gupton v. Gupton* (1870) 47 Mo. 37; *Sutton v. Hayden* (1876) 62 Mo. 101; *Teats v. Flanders* (1893) 118 Mo. 660 (24 S. W. Rep. 126); *Newton v. Newton* (1891) 46 Minn. 33 (48 N. W. Rep. 450); *Schutt v. Society* (1886) 41 N. J. Eq. 115 (3 Atl. 398); *Stone v. Todd* (1887) 49 N. J. Law, 275 (8 Atl. 300); *Whetstone v. Wilson* (1889) 104 N. C. 385 (10 S. E. Rep. 471); *Huguley v. Lanier*, 86 Ga. 636 (12 S. E. Rep. 922, and Am. St. Rep. 487, note); *Hudson v. Hudson*, 87 Ga. 678 (13 S. E. Rep. 583); *Wallace v. Long*, 105 Ind. 522 (5 N. E. Rep. 666); *Day v. Wilson*, 83 Ind. 463; *Ham v. Goodrich*, 37 N. H. 185; *Emery v. Smith*, 46 N. H. 151; *Leslie v. Smith*, 32 Mich. 64; *Sutton v. Rowley*, 44 Mich. 112 (6 N. W. Rep. 216); *Welch v. Lawson*, 32 Miss. 170; *Bender v. Bender*, 37 Pa. St. 419; *Clark v. Davidson*, 53 Wis. 317 (10 N. W. Rep. 384); *Howard v. Brower*, 37 Ohio St. 402; *Ellis v. Cary*, 74 Wis. 176 (42 N. W. Rep. 352); *Manning v. Pippen*, 86 Ala. 357 (5 South. 572, and 11 Am. St. Rep. 46, note); *Wellington v. Apthorp*, 145 Mass. 69, 72 (13 N. E. Rep. 10); *Taylor v. Wood*, 4 Lea. 504; *Frost v. Tarr*, 53 Ind. 390. By these authorities I show that, where there is an express agreement between a father and a son that the father will devise the home place to the son, or in some testamentary way compensate him for his services, if the son will attend to and take care of him for life, and the son performs his part of the agreement, he is entitled to recover upon a *quantum meruit* for his services if the father's part of the contract is unperformed. See *Grant v. Grant* (Conn.) 29

Atl. 15 (38 Am. St. Rep. 393) note; *Hudson v. Hudson*, 87 Ga. 678 (13 S. E. Rep. 583)—that it is a valid contract, though not in writing, not forbidden by the statute of frauds, and not barred by the statute of limitations, until the prescribed period has run since the death of the promisor before the bringing of the suit. *Raynor v. Robinson* was a case much like this in its facts; was discussed and decided in the surrogate's court, in the Supreme Court (1862) 36 Barb. 128, and finally in the court of appeals, 28 N. Y. 494, the latter holding that where services are rendered by one person to another in pursuance of a mutual understanding and agreement between the parties that compensation shall be made for them by will, and the party receiving the services dies without making the expected compensation, the party rendering the services is entitled to compensation out of the estate of the deceased as a creditor for the value of the services. *Robinson v. Raynor* (1864) 24 N. Y. 494; Bish. Cont. § 224; 2 Chit. Cont. (11th Am. Ed.) p. 798, note g; 2 Whart. Cont. § 719; Lawson, Cont. § 38; *Stewart v. Small* (Ind. App.; 1894) (38 N. E. Rep. 826).

Sixth. But there may be danger of abuse. In many cases there is a peculiar danger of abuse, requiring, therefore, peculiar guards against it; requiring the court to be on its guard not to let things done under the impulse of affection in discharge of a moral duty, usurp the place of a legal duty discharged, and thereby create a legal right. See *Houck v. Houck* (1882) 99 Pa. St. 552, and many cases of like kind. See 2 Pars. Cont. (8th Ed.) pp. 50, 51, notes, and cases cited. It may in some cases have been held to create a *quasi* obligation to compensate, raised by law out of the special circumstances of particular cases, but by the great weight of authority has not reached that point. The law requires, under such circumstances, the sanction of an agreement to compensate, express or by inference fairly and clearly arising out of what is said and done by both parties, that if the one shall work and care for his aged parent so long as he shall live, he, the father, will compensate the son in some testamentary way; and if in pursuance thereof the son performs his part of the agreement, which the father adopts

and enjoys as long as he lives, but neglects to do his part, or his testamentary paper attempted in execution thereof miscarries, or from any cause proves ineffectual, then the son's right to action against the estate accrues, and the only question is, what does he deserve to have as the value of the services rendered? On what possible ground can the superadded moral element on his part, or the abortive testamentary paper on the father's part, destroy or impair his legal right to a *quantum meruit* compensation?

Serenth. But it is not obnoxious to clause seven of section one of chapter 98 of the Code, which forbids the bringing of an action on an oral agreement that is not to be performed within a year? The answer is, "No, because complete performance on the part of plaintiff within the year, as by the death of his father, is not impossible within the terms of the agreement." And this answer was given in *Peter v. Compton* (1694) and has been adhered to ever since. See *Peter v. Compton*, 1 Smith, Lead. Cas. (9th Am. from 9th Eng. Ed.) 586, 591; Bish. Cont. § 1284; *Kent v. Kent* (1875) 62 N. Y. 560; *Wellington v. Aphorp* (1887) 145 Mass. 69, 72 (13 N. E. Rep. 10; *Larimer v. Kelley*, 10 Kan. 298; *Jilson v. Gilbert*, 26 Wis. 637.

Eighth. It is not barred by the statute of limitations, for the statute does not commence to run until the right of action accrues, and such right did not accrue until after the promisor's death, for that was the time fixed; and plaintiff continued the performance of his part of the agreement up to the happening of that event. He then brought suit within two years—five years being the bar. *Kent v. Kent*, cited above; *Reynolds v. Robinson* (1876) 64 N. Y. 589; *Patterson v. Patterson*, 13 Johns. 379; *Price v. Price* (1840) 1 Cheves, Eq. 167; *Stone v. Todd* (1887) 49 N. J. Law, 275 (8 Atl. 300). Where the promisee serves until the death of the promisor, this question presents no difficulty. It only arises where the promisor breaks or repudiates his contract before death and dismisses the promisee. See *Johnson v. Hubbell*, 10 N. J. Eq. 332 (26 Am. Dec. 773, 785, note). See case of *Jincey v. Winfield*, 9 Gratt. 708, 718. In this case the bar of the statute was applied to part of his claim, because he stopped ren-

dering his services and sued the testatrix in her lifetime on the ground that she had disabled herself from making the will promised. It is an authority on the main point. On a promise to pay for a thing by request it begins to run from the death of the person promising. *Bish. Cont.* § 1354; *Eagan v. Kergill*, 1 Dem. Sur. 464; *Schouler, Wills* (2d Ed.) § 453; *Schouler, Dom. Rel.* (3d Ed.) § 274. See 2 *Pars. Cont.* (8th Ed.) pp. 50, 51, notes and cases cited. The statute does not begin to run until the cause of action accrues, and this is the provision in all our statutes. The creditor must first have a perfect right to prosecute his demand according to the civil law. *Evans' Poth.* 404; 1 *Wood, Lim.* (2d Ed.) p. 324. § 119, notes. See *Tuckey v. Hawkins*, 4 C. B. 655; *Sanders v. Coward*, 15 Mees. & W. 56. So, where a contract for services provides that payment shall be made by provision in the employer's will, a right of action does not accrue until after the employer's death, because up to that period there has been no breach. *Nimmo v. Walker*, 14 La. Ann. 581. So I have found it laid down in all the cases and books which I have been able to consult that touch upon the subject, and see no reason why this should be an exception to the general rule.

Again, is this due-bill a testamentary paper? It is proven to be wholly in the handwriting of the deceased, Jacob Cann; the body of the instrument as well as the signature. And, taken in connection with what he declared he intended to do by way of compensating plaintiff for his services, and the fact that it was never delivered, it would seem that he intended it to take effect after his death.

The law is well settled that the form is immaterial, or the fact that it is also an obligation made on valuable consideration, if it was intended to take effect after death; it may be regarded as testamentary for purposes of probate. *Ex parte Day* (1851) *Bradf. Sur.* 476, 482; *Pollock v. Glassell* (1846) 2 *Gratt.* 439, 455. No matter what the form given or intended, provided it be the intention of the deceased that it should operate after his death. *Roberts v. Coleman*, 37 W. Va. 143, 151 (16 S. E. Rep. 482). Whether the maker would have called this a testamentary paper or not is one question.

Whether it shall operate as such is a distinct question, that is to be determined by the provisions of the instrument. It depends upon its contents, not upon any declaration of the maker. *Habergham v. Vincent*, 2 Ves. Jr. 231; *Patterson v. English*, 71 Pa. St. 454; Schouler, Wills, § 272. To determine this, the instrument must be read by the light of all the surrounding circumstances, and, where the instrument itself is silent or equivocal, collateral evidence is admitted in order to show whether or not a testamentary disposition was actually intended. *Id.* § 273. In this case there is nothing in the scope or bearing of the contents of the instrument that indicates that it is to operate after death, but, in the view I take of it, this is wholly unimportant, for, if genuine, it is certainly competent as an admission on the part of the decedent that he owed plaintiff three thousand dollars for services since he became twenty one years of age, because it is an original entry, shown to be wholly in the handwriting of deceased, against his interest at the time made by him in his book of accounts produced and proved. This is upon the ground that, being against his own pecuniary interest, he could have no motive to make a false entry. *Barton v. Scott*, 3 Rand. (Va. 399; *Gale v. Norris* (1841) 2 McLean, 469, Fed. Cas. No. 5,190. See *Higham v. Ridgway*, 10 East, 109, 3 Smith Lead. Cas. (9th Am. from 9th Eng. Ed.) 1607, 1617. That this is a good reason for admitting an entry, made by a person deceased, to be evidence, numerous decisions have established beyond all controversy, made since the case of *Higham v. Ridgway*, especially against those claiming under and in privity with the deceased. See *Mahaska Co. v. Ingalls* (1864) 16 Iowa, 81; *Rand v. Dodge*, 17 N. H. 343; *Harriman v. Brown*, 8 Leigh, 697; 1 Greenl. Ev. §§ 171, 212; Chamberlayne's Best, Ev. § 518; 2 Am. & Eng. Enc. Law, 467m. That original entries on plaintiff's books may, in certain cases, be evidence for himself, see *Downer v. Morrison* (1845) 2 Gratt. 250. See, also, *Griffin v. Macauley* (1851) 7 Gratt. 476. Nor is it material that the document has never been delivered or communicated, so as to influence conduct, so as to be effectual as an express promise or as an acknowledgment from which a promise may be implied, or so as for any reason to create

no obligation; it is nevertheless competent and admissible as evidence. *Hickey v. Hinsdale*, 12 Mich. 99; *Ayres v. Banc*, 39 Iowa, 518; *Atkins v. Plympton*, 44 Vt. 21; *Reis v. Hellman*, 25 Ohio St. 180; *Huffman v. Cartwright*, 44 Tex. 296. It is certainly competent evidence to prove the contract set up by plaintiff in his bill. It is an admission against the pecuniary interest at that time of the party who made the original entry in his book of accounts, proved by producing and proving the original book and the entry to be in his handwriting, and the signature in a suit wherein his heirs at law and privies in estate are defendants. "The universal experience of mankind testifies that as men consult their own advantage, whatever they say or admit against their interest or advantage may, with tolerable safety, be taken to be true against them, at least until the contrary appears." Best, Ev. § 519.

I concur in reversing the decree complained of, and in directing the ascertainment of a *quantum meruit* compensation, although my own opinion is that that was sufficiently ascertained by the commissioner.

CHARLESTON.

JOHNSON *et al.* v. MINEAR.

Submitted September 13, 1894—Decided December 18, 1894.

A. B. PARSONS for appellant.

LIPSCOMB & LIPSCOMB for appellees.

BRANNON, PRESIDENT:

Johnson and Phillips brought a chancery suit in the Circuit Court of Tucker county against Minear to set aside two tax deeds for lands sold for taxes November 12, 1889, and they were set aside, and Minear took this appeal.

For reasons given in the case of *Phillips v. Minear*, decided this term, see 40 W. Va. 58, the decree appealed from is affirmed.

JANUARY TERM, 1895.

CHARLESTON.

KESTER *et al.* v. LYON *et al.*

Submitted September 12, 1894—Decided January 19, 1895.

1. COMMISSIONS—EXECUTOR

Commissions to an executor on uncollectible debts ought not to be allowed. If entitled to anything for service as to them, it must be specific compensation.

2. COMMISSIONER'S REPORT—EXCEPTIONS.

Exceptions to a report of a commissioner in chancery must point out the particular errors with reasonable certainty, so as to direct the mind of the court to them. Where exceptions are taken to certain parts of a report, the others not excepted to are admitted to be correct, both as regards the legal principles and the evidence on which they are based.

3. COMMISSIONER'S REPORT—EXCEPTIONS—ADULT PARTIES.

If a report is not excepted to it is taken to be correct as to adult parties and will not be examined by either the lower or appellate court, and no advantage of any error therein can be taken, unless it be error apparent on the face of the report; but such an error can be taken advantage of in either court at the hearing, without exceptions.

4. COMMISSIONER'S REPORT—EXCEPTIONS—PLEADINGS AND EXHIBITS.

To show such error on the face of a report, in the absence of such exceptions as bring before the court the evidence before the commissioner, recourse may be had to the pleadings and exhibits therewith, provided it be impossible that the alleged error could have been affected by extrinsic evidence.

5. COMMISSIONERS' REPORT—CHANCERY PRACTICE.

If such report be excepted to within the ten days after completion during which it lies in the commissioner's office for examination, the commissioner must return the exceptions, with such remarks thereon as he thinks proper, and the evidence relating to the exceptions, and such evidence will be considered on the hearing of such exceptions; but, if no exceptions be filed within those ten days, the evidence on which the Commissioner acted is

40	161
40	559
40	622

40	161
42	307
42	636
42	667

40	161
43	298

40	161
44	563

40	161
46	750

40	161
47	449

40	161
48	493

40	161
149	150
49	660

40	161
54	643

40	161
57	61
67	62

40	161
61	524

40	161
65	621

40	161
65	621

not required to be returned by him, and forms no part of the report, and will not be considered on the hearing of any exceptions that may be afterwards taken to the report, unless made a part of the report by the report itself, or unless it be brought up by order of the court. (But see Acts, 1895, c. 8).

6. CHANCERY PLEADING—EXHIBITS.

Where a bill or other chancery pleading exhibits a document, the document is a part of such bill or pleading as fully as if incorporated therein.

JOHN BASSELL for appellant, cited 23 Gratt. 674; 11 W. Va. 399, 412; 6 W. Va. 417.

W. SCOTT for appellees, cited 11 W. Va. 411; 2 Munf. 242; 1 Munf. 150; 3 Munf. 198; 4 Minor, part 2, 1235; Code, c. 87, s. 6; 4 Minor, part 2, top pages 1374-1376; 3 Wait's Actions and Defenses, 263; 9 Bush (Ky.) 19; 57 Pa. St. 46; 4 Minor, part 2, top page 1377; 3 Wait, 262; 2 Worner 706-711.

BRANNON, JUDGE:

This is an appeal taken by James M. Lyon from a decree of the Circuit Court of Harrison County in a suit brought by Celia M. Kester and Samuel O. Kester, her husband, against Lyon, to compel a settlement of his accounts as executor of Cyrus Ross, deceased, and to surcharge and falsify certain settlements which he had made before a commissioner of the County Court. One item of complaint by the appellant against the decree is that it disallows and refuses to Lyon three thousand, one hundred and sixty five dollars and forty eight cents, which had been allowed him in *ex parte* settlements as commission on insolvent uncollectible debts belonging to the estate. The executor was allowed commissions, and no complaint is made to the percentage of commission.

We can not sustain the claim for a commission on uncollectible debts. The statute bearing on the subject is that the fiduciary shall be allowed "any reasonable expenses incurred by him as such; and also, except in cases in which it is otherwise provided, a reasonable compensation in the form of a commission on receipts or otherwise." Code, c. 87, s. 17. The usual mode of compensation to the fiduciary for

service is by a commission on receipts, but where that affords no basis, some other process is allowable, but generally a *per centum*, greater or less, on receipts will answer all purposes. If a small commission is not just, the commissioner or probate court can increase it. *Estill v. McClintic*, 11 W. Va. 399. There are instances where it has been allowed on disbursements. *Boyd v. Oglesby*, 23 Gratt. 674. But how insolvent assets can give any basis or measure for commission we can not see. I have not found any instance of its application. No money from them has ever come to the hands of the fiduciary. It would be a dangerous precedent to adopt. If the fiduciary gets commission on debts solvent or insolvent what interest has he to use energy to collect them? This estate was a large one. It had many debts outstanding, and thousands of dollars were uncollectible. The executor gives evidence that he spent much time and effort in actual litigation, and otherwise by personal and diligent service, to realize these assets, and he says his commission on receipts is utterly inadequate compensation. Likely it is. My observation has been that the usual five *per cent.* on receipts, in cases of estates of size and complication, is too small a compensation for the labor and responsibility; but the executor is not to be compensated on the basis of percentage of uncollectible debts. If he rendered service as to them demanding compensation he should have rendered specific charges for specific services. We should be reluctant to overrule the action of a county or circuit court allowing a certain commission, rather than a lower or higher one, but not when the basis of allowance is unheard of and dangerous, and affords no just gauge. The commissioner and Circuit Court properly refused to allow this commission.

Another complaint against the decree is that it charges the executor with interest on moneys in his hands to an amount greater than the interest actually received by him. He says in his evidence, what is no doubt true, that of the large amount of money in his hands a good deal was often idle; that he had to keep on hand a considerable amount to meet current expenses of litigation; that litigation between two contesting wills lasted from 1873 to 1888, and in these

many years it was difficult, and at times impracticable, to find borrowers; that loans to cattle graziers would be made in the spring, and return in the fall, and for a time lie idle. He reported interest received by him to the large sum of four thousand, seven hundred and fifty three dollars and twenty eight cents, a circumstance attesting in favor of his energy in making loans. The amount of interest charged against him exceeded what he received by four thousand, four hundred and three dollars and nineteen cents. He received some loans in excess of lawful rate, which excess was not debited to him; but deducting that, the excess of charge of interest over all receipts was three thousand, two hundred and ninety six dollars and eighty four cents. Doubtless there is some hardship on the executor herein, but the case of *Granbery v. Granbery*, 1 Wash. (Va.) 249, reviewed and approved in *Burwell v. Anderson*, 3 Leigh 384, will not allow us to depart from the principle carried out by this decree of charging interest on balances of money in the executor's hands at the close of each year of his executorship covered by the account.

Another complaint by appellant is that he is twice charged with six hundred and forty seven dollars on account of a debt against Willis and Jarvis. The report on which the decree is based charges principal eight hundred and forty one dollars and seventy two cents, and interest two hundred and sixteen dollars and eighty eight cents, for "decree against Geo. E. Willis and William Jarvis in their suit against said executor." A former *ex parte* settlement charges the executor with "cash on note of Geo. E. Willis and Wm. Jarvis, six hundred and forty seven dollars." As the balance found in this settlement enters into the account on which the decree is based, if the debt charged to the executor in this account is the same as that for which the six hundred and forty seven dollars is charged, the executor is wronged to the extent of six hundred and forty seven dollars, with interest from October 20, 1887, to date of last account. Is it the same debt? To show that it is appellant's counsel appeals to a list of notes which went into the executor's hands, and we find it lists: (1) Note on G. E. Willis and Wm. Jarvis for

\$400." This list is an exhibit with plaintiff's bill. The first question occurring is whether we can look to this list reciting this note to determine whether the debt for which the six hundred and forty seven dollars was charged and that charged in the commissioner's report, and entering into the decree, are the same. There were exceptions to the commissioner's report, but none as to this item of charge

This court has decided that exceptions to a commissioner's report have to be of the nature of a special demurrer, and must point out the alleged errors with reasonable certainty, so as to direct the mind of the court to them; and, when the party so excepts, the parts not excepted to are admitted to be correct, not only as regards the principles, but as relates to the evidence upon which they are based. *Reit v. Bennett*, 4 W. Va. 417; *Crislip v. Cain*, 19 W. Va. 438; *Chapman v. Railroad Co.*, 18 W. Va. 184, point 9; *Keck v. Allender*, 37 W. Va. 201 (16 S. E. Rep. 520) point 1; *Hutton v. Lockridge*, 22 W. Va. 159.

Suppose the error not excepted to be apparent on the face of the report, does the failure to except to it waive it, and preclude the party from availing himself of it on the hearing in the appellate court? Does it estop him, if he overlooks it and fails to except to it? The generality of the language of *Crislip v. Cain* would support the contention that it would, yet I think not. *Hutton v. Lockridge*, 22 W. Va. 176. If it would, this would debar Lyons from relief as to this item, as he did not except to it, while he did to others. Without exception no error of the report can be taken advantage of by adults, unless it be an error on the face of the report. *McCarty v. Chalfant*, 14 W. Va. 531; *Ward v. Ward*, 21 W. Va. 262; *Thompson v. Catlett*, 24 W. Va. 525.

There being no exception, then, to this item of the report, the appellant has no right to ask this Court to give him the benefit of it, unless it is to be deemed an error on the face of the report. What do we mean by the words "face of the report"? Does it mean face of the report alone? or can we include other parts of the record? It does not include depositions, or even documentary evidence, simply filed as such, and not exhibited with pleadings. The case of *Bank v.*

Shirley, 26 W. Va. 563, goes to the extent of including the pleadings as part of the report, as it holds that, though there be no exception to a report, and no error appears on the face of the report, yet, when taken in connection with the pleadings error in the report appears, the error will be corrected by the appellate court, it being impossible in such cases to be affected by extrinsic evidence. When we look at the mere face of the pleadings in this case, we are not helped, but we find exhibited with the bill a settlement made by Lyons with a commissioner, and as part of it a list of the estate's notes as stated above, and this list is part and parcel of the bill; for in chancery all exhibits with a bill or answer are parts of that bill or answer, and, generally, where one paper refers to another in a manner so as to identify it, that other paper is a part of the paper referring to it. *Gunn v. Railroad Co.*, 37 W. Va. 421 (16 S. E. Rep. 628) and citations in opinion; *Bart. Ch. Prac.* 345; *Bias v. Vickers*, 27 W. Va. 461, and cases cited; *Craig v. Sebrell*, 9 Gratt. 131; *Tracy v. Shumates*, 22 W. Va. 476. Thus we have before us this list of notes. Examine it, and it is found that it mentions a note of four hundred dollars on G. E. Willis and William Jarvis. Does it thence follow that this is the same debt charged in the commissioner's report as one arising from decree against George E. Willis and William Jarvis in their suit against said executor, with interest from the date thereof, eight hundred and forty one dollars and seventy two cents? By no means. There is no earmark of amount, date, or otherwise, save as to debtors. The evidence that is before us does not show it, and, if we could consider all the evidence before us on account of the points excepted to, it is not claimed there is any evidence to show it. It is a mere probability that it is the same, not a certainty, for there may have been two debts on same parties. Oral evidence before the commissioner, not brought up with his report, might have so shown him. Now, remember that *Bank v. Shirley*, *supra*, only allows us to look at pleadings, and find error in the report, when it is impossible that the result may be affected by any extrinsic evidence; and remember the numerous cases saying that, without exceptions, adult parties shall not impeach

a report on grounds and in relation to matters which may be affected by extraneous matters. *Evans v. Shroyer*, 22 W. Va. 581; *Hyman v. Smith*, 10 W. Va. 299; *McCarty v. Chalfant*, 14 W. Va. 531; *Thompson v. Catlett*, 24 W. Va. 524. Others can be given. Under the rule of *stare decisis*, we can not depart from these decisions to meet what I regard as likely a hard case. Documents filed with brief of counsel render it practically certain that this double charge exists, but, as counsel admits, they are no part of the record.

Another complaint is for the first time made in brief of appellant's counsel, and is stated thus by it: "Another error against appellant, apparent upon the face of the report, or at least, a matter which is a great hardship upon him is this: Beginning with page 241, Commissioner Lynch makes a statement of the amount of assets in the hands of appellant as executor, and he commences by charging him with seventy three thousand, five hundred and eighty seven dollars and ninety six cents as of the 20th of October, 1888, and two thousand, two hundred dollars and sixty cents of interest collected up to that date. This is an error, as we will now show. On page 187 of record and the three following pages will be found the settlement made by Commissioner Denham of appellant's accounts, from which it will be seen that the commissioner charges appellant with principal, seventy two thousand, six hundred and fifty four dollars and twenty three cents; interest collected to October 20, 1888, two thousand, six hundred and forty nine dollars and seventy nine cents; and bank dividends, two hundred and sixty four dollars—making the total charges seventy five thousand, five hundred and sixty eight dollars and two cents. And on page 189 he gives total credits one thousand, nine hundred and eighty dollars and six cents, leaving a balance on cash account as of October 20, 1888, seventy three thousand, five hundred and eighty seven dollars and ninety six cents, which shows that all the interest up to that time collected or received by appellant was charged to him and settled as of that date. On page 283 of record will be found a settlement of appellant's accounts made by Commissioner Adams as of the 20th of March, 1890, in which appellant is charged with

this cash balance of seventy three thousand, five hundred and eighty seven dollars and ninety six cents, and with interest collected up to that date, two thousand, two hundred dollars and sixty cents, which is interest that had accumulated between October 20, 1888, and March 20, 1890; but Mr. Lynch erroneously charged this item back as having been received prior and up to October 20, 1888; and therefore when this item is carried into appellant's account he loses about two years' interest erroneously charged to him upon the sum of two thousand, two hundred dollars and sixty cents." But, turning to Adam's settlement, we find it stated thus: "1888, Oct. 20. To balance on cash account at settlement this date, \$73,587.96; to interest collected, \$2,200.60"—thus showing that Adams reported two thousand, two hundred dollars and sixty cents interest as collected up to October 20, 1888, not March 20, 1890. Lynch so found and reported in the report made the basis of the decree. Adams' report did not enter into this report.

But, if this were not so, this error does not appear on the face of the report, and Adams' report is called upon to manifest it, and that is no part of the pleading, but of a deposition; and as there was no exception to the report within the ten days during which it was in the commissioner's office, and never any exception as to this matter, the evidence, including this deposition, can not be looked into. *Arnold v. Slaughter*, 36 W. Va. 589 (15 S. E. Rep. 250); *Holt v. Holt*, 37 W. Va. 305 (16 S. E. Rep. 675); *Thompson v. Catlett*, 24 W. Va. 525.

The commissioner, if exceptions are filed within ten days, himself certifies the evidence touching the same, so as to make it manifest that he has sent it up, but he has certified none in this cause. *Arnold v. Slaughter*, 36 W. Va. 589 (15 S. E. Rep. 250).

Thus we are brought to the conclusion that we can not reverse the decree.

[NOTE BY BRANNON, JUDGE:—It is prudent to note the fact that after the above decision, ch. 8, Acts 1895, was passed making changes in the statute law referred to above, changes which may render useless many prior decisions and materially alter practice.]

CHARLESTON.

CROTHERS' ADM'R v. CROTHERS *et al.*

Submitted September 12, 1894—Decided February 1, 1895.

1. EVIDENCE—STATEMENTS OF DECEDENT.

When a transfer of property has been made, a declaration by the transferrer that he is still the owner of the property, made after such transfer, is not admissible against the transferee.

2. EVIDENCE—STATEMENTS OF DECEDENT.

Declarations of a deceased person, claiming ownership of specific property, are not competent evidence in favor of his administrators, or others claiming title under him, whether such declarations of ownership were made before or after the title of the adverse claimant commenced. *Masters v. Varner's Ex'rs*, 5 Gratt. 168.

3. EVIDENCE—COMPETENT WITNESSES.

A person interested may give evidence against his own interest, both at common law and under section twenty three of chapter one hundred and thirty of the Code.

4. EVIDENCE—COMPETENT WITNESSES.

The purpose of section twenty three of chapter one hundred and thirty of the Code, was to enlarge the competency of witnesses. It does not *per se* render any incompetent who are competent at common law. The exception therein does not create incompetency, but leaves the cases specified in it just as they were at common law.

5. EVIDENCE—COMPETENT WITNESSES.

Children of a decedent, who are his distributees, are competent witnesses to prove a transfer by their father of personal estate in favor of the transferee.

6. EVIDENCE—COMPETENT WITNESSES.

By common law a person is a competent witness in a case if the proceeding can not be used as evidence for him, though he may be interested in the question in issue, and may entertain wishes on the subject, and may even have occasion to contest the same question in his own case in a future suit. This rule has not been changed by section twenty three of chapter one hundred and thirty of the Code of 1891, as to the competency of a person to testify against the representatives of a deceased person in relation to a transaction had personally by the witness with the deceased person.

40	169
42	607
42	790

40	169
47	294
47	424

40	169
49	282

40	169
52	351

40	169
55	493

40	169
104	23

40	169
66	294

W. W. ARNETT for appellants, cited Code (1891) c. 130, s. 23, and cases there cited.

CALDWELL & CALDWELL for appellees, cited 149 Pa. St. 201; 28 W. Va. 460, 465 and 469; 27 W. Va. 455; 24 W. Va. 84; 33 W. Va. 243; 9 W. Va. 194 and 195; 29 W. Va. 294; 32 W. Va. 125 and 127; 5 Gratt. 168; 2 Blackford (Ind.) 461; 1 Bibb, (Ky.) 154; 1 Johns. (N. Y.) 159; 8 Johns. (N. Y.) 428; 10 Conn. 121; 1 Rice Ev. 542-543; 32 South Car. 359; 55 Hun. 593; 59 N. H. 507; 11 W. Va. 562-567; 28 W. Va. 463; 33 W. Va. 494; 17 W. Va. 691-692; 33 W. Va. 243; Code W. Va. c. 130, s. 23; 29 W. Va. 224, 234; 33 W. Va. 237, 243; 32 W. Va. 527, 539; 32 W. Va. 119, 125; 1 Greenl. on Ev. § 410; 24 W. Va. 72, 84; 20 S. C. 567, 573; 43 Mich. 208, 218; 54 N. Y. 389, 401; 10 Wend. 403; 37 W. Va. 38; 31 W. Va. 662; 28 N. J. 274, 277; 20 W. Va. 327; 37 W. Va. 60; 4 Gratt. 188; 2 Perry on Trusts, 2 Ed. § 891; 31 W. Va. 141; 35 W. Va. 480; 36 W. Va. 45; 27 W. Va. 642; 28 W. Va. 731; 31 W. Va. 571; *Ibid.* 141; 33 W. Va. 510; 35 W. Va. 731; 29 W. Va. 116; 32 W. Va. 44; 33 W. Va. 278; *Ibid.* 164, 165; 30 W. Va. 195; 31 W. Va. 591; 36 W. Va. 683.

BRANNON, PRESIDENT :

This was a chancery suit in the Circuit Court of Ohio county by the administrators of Samuel J. Crothers, deceased, against L. M. Crothers, to set aside a transfer purporting to have been made by said decedent to L. M. Crothers of certificates for ten thousand dollars stock of the Bank of the Ohio Valley, at Wheeling, and, the bill having been dismissed, the administrators appeal.

The grounds on which the plaintiffs base their prayer for the annulment of such transfer of stock are undue influence, fraudulent representation, and the mental imbecility, from old age, of Samuel J. Crothers, and the charge that the written transfer is a forgery.

Without giving the evidence, I may dismiss the first three grounds as unsustained by it; or, as would be more appropriate to say, there is no evidence to detail as to those grounds.

As to the allegation of forgery. The detail of evidence on this point could answer no purpose for future cases. The

only persons present at the execution of the transfer of stock besides Samuel J. Crothers, the father, and L. M. Crothers, a son, were Lizzie Crothers and Mrs. Dorrance, two of his daughters. The father did not sign the transfer with his own hand, but directed his son L. M. Crothers to sign his name to the formal transfer printed on the stock certificates. The two daughters are very definite in their evidence that on an occasion when L. M. Crothers was about to go to Wheeling the father suggested that he take the certificates with him to the bank in Wheeling, and have the transfer formally made on the stock book; that L. M. Crothers was disposed to postpone it, saying to his father that he was then confined to his bed and that another time would do; but the father, being in the seventy seventh year of his age and feeble, was urgent to have the transfer at once made, and caused his son to fill up and sign for him the written transfers. There is no showing to the contrary of the evidence of these two ladies. If they are to be believed, they clearly establish the transfer of the stock. W. B. Crothers, another son, and one of the administrators bringing this suit, says that after this alleged transfer his father stated that he had stock in the Wheeling bank, and could not account for the fact that he was getting no dividend upon it, thus negating all idea that already the stock had been assigned to L. M. Crothers; but this evidence can avail nothing—First, because W. B. Crothers is not a competent witness as to a communication with the deceased, since he is a party plaintiff, and interested to secure this fund for distribution, part of it going to himself, outside of his liability for costs (*Seabright v. Seabright*, 28 W. Va. 463); and he also is giving a declaration of a party made after assignment to overthrow the title of the assignee of that party, *Casto v. Fry*, 33 W. Va. 44 (10 S. E. Rep. 799); and also because the self-serving declaration of Samuel J. Crothers is not admissible for himself or his estate, because it is a declaration in his own behalf (*Masters v. Varner's Ex'rs*, 5 Gratt. 168).

Mr. Dorrance states that the old gentleman stated to him that he had given L. M. Crothers this stock to make up a loss to him in the sale of a farm mentioned below. Now, this ad-

mission is admissible to sustain the transfer, because it is against the interest of the party making it, and not, like that made to William B. Crothers, going to sustain his title. I regard Dorrance's evidence as of great force, in corroboration of the evidence of Lizzie Crothers and Mrs. Dorrance. There is, in a legal point of view, no evidence against this positive evidence. There is a circumstance which, at first view, seems quite strong against the genuineness of the signature to the transfer; and it is this, that the two ladies present at the making of this signature say the old gentleman told his son, L. M. Crothers, to write his name so as to resemble his handwriting as nearly as he could do so, and that the signatures themselves bear the look of tremulousness of the old man's hand. Why, we may ask, did the old man wish his writing simulated? It would be natural that he should simply direct his son to write his name, and have his daughter witness it, as she did. The old man, too, could write himself, but he was feeble and in bed, and wrote with difficulty. He may have thought that, as his handwriting was known at the bank, it would be better to imitate it. This circumstance, I confess, is one which inspires suspicion; but it is only a circumstance, and not of a conclusive nature, and stands alone, without any evidence to be linked with it, and is overborne by the positive evidence above stated. If these ladies were not truthful, they would hardly have told this adverse fact. There is another circumstance, hardly worth the mention, in my judgment, and this is that Samuel J. Crothers also transferred on the same date to L. M. Crothers some stock in an Ohio glass manufacturing company, and, in a suit in Ohio by those administrators to overthrow it for like causes with those on which this suit is based, L. M. Crothers made no defense. He says he knew not the contents of the complaint in that case, and he says and proves that he was advised by counsel not to defend, because the stock was of very little value, not worth the cost of attendance in defense of the suit, and might call upon him, if he were owner, to contribute as a stockholder to pay debts of the concern.

I think the Circuit Court was bound on the evidence to decide the case as it did, and find the transfer genuine. This

being so, we have nothing to do with the justice of the matter, as between the father and L. M. Crothers and the other children; but some good reasons appear. L. M. Crothers owned a farm, and his brother W. B. Crothers importuned him to sell it, but L. M. Crothers objected to doing so, when his father, at the instance of William B. Crothers, advised him to do so, and he did so against his will, and bought from his father with its proceeds stock in a Pittsburg bank, which broke, and left the stock a dead loss to L. M. Crothers, while the very farm he had unfortunately sold developed into an oil field (from which William B. reaped large returns) which but for his sale L. M. Crothers would have realized; and the old man, long before his death and the transfer of the Wheeling bank stock, declared he intended to make up this loss in some measure to the unfortunate son, and he carried out this settled purpose by the transfer of the stock in question. Moreover, when L. M. Crothers sold his farm, he moved upon a farm belonging to his father close by the home in which his aged father and mother and maiden sister lived, and worked it for their support, while all the others of his seven children went off to themselves. L. M. Crothers is a man fifty two years old, and for a number of years worked the farm and supported his father, mother and sister, and his father declared his kindness to him and his own obligation for it. So we see good reason for the transfer, which I mention as not only going to repel undue influence, false representation, and imbecility, but to negative what I think is the only matter of importance under the evidence; that is, the imputation of forgery of the transfer. The evidence is substantially on one side, that of the defendants. That being so, of course, we can not reverse. The burden to establish the basis on which the plaintiffs predicate their case, lying on them, they must establish it by full proof, not to say proof beyond reasonable doubt. I agree with what, from an opinion of Judge Paull in the case, seems to have been his view, that it is not a case of conflicting evidence, and therefore it seems hardly necessary to say that, if we treat it as a case of conflicting evidence, the opinion of the Circuit Court must stand. *Bartlett v. Clearinger*, 35 W. Va. 719 (14 S. E. Rep. 273); *Prichard v.*

Evans, 31 W. Va. 141 (5 S. E. Rep. 461). Even if we regarded the conclusions to be derived from the evidence doubtful, as we do not, we could not reverse the court below. *Reger v. O'Neal*, 33 W. Va. 164 (10 S. E. Rep. 375). We must see that the court below erred plainly in weighing and deciding on the evidence.

As said above, the evidence of Lizzie Crothers and Mrs. Dorance makes it clear, if we believe them, that the transfer is not a forgery. But it is urged that they are incompetent as witnesses. They are not incompetent to give the evidence they gave at common law, as they are neither parties nor interested, because they give evidence to support the transfer, which takes the property away from distribution, in which they should share, and forever excludes them from any share in it. It is well settled that where a witness testifies against his interest, the rule that interest disqualifies does not apply. 1 Greenl. Ev. § 410. So the common law does not debar these witnesses. Then does the statute, section 23 chapter 130, Code? It does not. Its object was to widen, not to narrow, the competency of witnesses—to make those competent not competent before, and not to create or enact incompetency. It is often important to remember this in construing this statute so radically innovating on the law of evidence. *Gilmer v. Baker*, 24 W. Va. 84; *Page v. Whidden*, 59 N. H. 507. Its first clause is a revolution and reversal of the common-law rule excluding a witness because a party to the suit or interested in its event. It makes persons, so far as their being parties or interested would exclude them, competent. But the second clause contains exceptions to this sweeping declaration of competency, because it declares that no party to a suit, or any one interested in its event, or any person from, through or under whom such party or interested person derives any interest by assignment or otherwise, shall be examined, in regard to any personal transaction or communication between such person and a person deceased, insane, or lunatic, against the executor, administrator, heir, distributee, assignee, legatee, devisee or survivor of one deceased, or the assignee or committee of an insane person. This exception originates no new incompetency, but only

continues, in certain cases, the old incompetency of the common law; takes them out of the general enactments of the first clause of section twenty three. Opinion in *Kilgore's Adm'r v. Hanley*, 27 W. Va. 455.

Where the statute is a mere proviso or saving clause in the act abolishing the common-law disqualification of interest, it does not make incompetent such testimony as would be competent at common-law. Abb. Tr. Ev. 61. So, these two female witnesses, being competent by common law, are not made incompetent by the statute. In *Robinson v. Robinson*, 20 S. C. 567, 573, this view of such a statute is held, and that case is otherwise apposite in this case, as it holds that, in an action by an administrator to settle an estate, two distributees may prove the execution of a note by the deceased, with them as sureties, because testifying against their interest.

The following theory is relied upon by counsel as a reason for rejecting the evidence of Lizzie Crothers and Mrs. Dorrance: A month before the transfer of bank stock, Samuel J. Crothers conveyed to L. M. Crothers a farm for the consideration of fifteen thousand dollars, and the purchaser executed to Lizzie Crothers a note for ten thousand dollars, and to Mrs. Dorrance one for five thousand dollars, making up the fifteen thousand dollars. Those notes were gifts by the father to his daughters, and it is urged that this and the bank stock transfer are one common transaction, though a month apart, by which L. M. Crothers, Lizzie Crothers and Mrs. Dorrance stripped their old father of substantially all his remaining estate, to the injury of the remaining four children, and that we ought to treat both as one transaction, and thus make Lizzie Crothers and Mrs. Dorrance interested to sustain the transfer of bank stock, and thus exclude them as witnesses. For argument, say that they feel an interest in repelling the charge made in common against the deed from the father to his son L. M. Crothers, the gift of said purchase money to the daughters, and the transfer of the bank stock to L. M. Crothers; that the old man was imbecile, subjected to undue influence and misrepresentation—still the interest they feel is only a feeling, a bias going to their credit, and that interest, viewed in the strongest light, is only an interest in the ques-

tion involved in this suit, for they have no legal interest in its event. The decision in this suit could not be given in evidence against them or for them, in a suit involving their right to the notes. They get or lose nothing under said transfer. To exclude the witness, he must have an interest to be affected by the result of the suit by force of the adjudication, and though he may feel a bias in the struggle, and may even be interested in the question litigated, and may have to litigate the same question in future litigation of his own, that does not exclude him. *Gilmer v. Baker*, 24 W. Va. 72; *Masters v. Varner*, 5 Gratt. 168; *Clements v. Kyles*, 13 Gratt. 477; 1 Greenl. Ev. § 389. The interest, to exclude, must be not only in the result of the suit, but must be a present, certain, vested interest, not an interest uncertain, or contingent, though it matters not how small the interest may be. 1 Greenl. Ev. §§ 390, 391.

To exclude a witness, he must be interested in favor of the party calling him. *Sims v. Givan*, 2 Blackf. 461; *Kennedy v. Barnett*, 1 Bibb, 154. What benefit can flow to these witnesses from L. M. Crother's success? So far as actual interest, in a legal point of view is concerned, it is against him.

As pertinent, not to the point of competency, but to the grounds for the charge of undue influence and confederation of these three parties, and going to repel them, I will add that the gift to Lizzie was because she was a maiden lady forty six years of age, broken in health and helpless, and had spent many years living with and caring for her aged father and mother. All the other children, except Mrs. Dorrance, who was poor, were well situated in the world and independent. Why should she not be provided for? The provision for her came, not from undue influence, fraud and corruption, but from the strongest emotions of the father's heart to provide for the woeful years of his daughter, when both father and mother would be gone. The old man's heart was beating faintly under the weight of years and disease, but its pulsations were strong to shield a dependent daughter from the chills of biting poverty. Cold would have been his heart had he departed without doing this high duty! In this act a judge can not see fraud and vice, but noble action.

If it do some prejudice to other children in paltry dollars, so it be the old man's free act, a court can not criticise it on that score. He can make an unjust disposition if he choose.
Martin v. Thayer, 37 W. Va. 38 (16 S. E. Rep. 489).

Decree affirmed.

CHARLESTON.

FORD *et al.* v. FRIEDMAN *et al.*

Submitted January 11, 1895—Decided February 2, 1895.

WAIVER OF BREACH OF CONTRACT—IMPLIED ASSENT.

Where goods are shipped by the seller to one who had given an order for them, but they are shipped so late that the buyer is not bound under the contract to accept them, and he writes to the seller that it is too late to accept them, and that he will be compelled to return them, and the seller replies by mail, recognizing the buyer's right to reject and return the goods, but asking him to accept them, and saying if he will do so, that he will give the buyer an extra credit on the same for thirty days, and the buyer does not in any way reply to such offer within a reasonable time, and does not reship nor in any way attempt to return the goods to the seller, the buyer will be presumed to have assented to the seller's offer, and to have accepted the goods, and will be liable therefor as purchaser.

TOMLINSON & WILEY for plaintiffs in error, cited 3 B. & P. 582; 47 N. Y. 36; 3 Am. Rep. 177; Benj. Sa. 246-271; 18 W. Va. 771; 35 W. Va. 337; 39 Conn. 31.

JOHN E. BELLER for defendants in error, cited 35 W. Va. 337; 21 Enc. of Law p. 534 and notes; 24 W. Va. 747; 8 W. Va. 575; 26 W. Va. 345; 2 L. R. Ex. 193; Beav. 502; 40 Fed. Rep. 525; 26 Mich. 452; 27 Minn. 208; 21 Enc. of Law p. 539.

J. S. SPENCER for defendants in error, cited 21 Enc. of Law, p. 531, 535, 539; 26 Mich. 452; 27 Minn. 208; 63 Ill. 288; 115 Mass. 159; Schouler on Pers. Prop. § 388; 12 Allen (Miss.) 522; 17 Wis. 44; Benj. Sa. (6 Am. Ed.) § 593; 2 Barb. (N. Y.)

37; 119 Ill. 379; 144 Mass. 100; 121 U. S. 255; 103 Mass. 327; 42 Mich. 296; 55 N. J. L. 320; 18 W. Va. 771; 35 W. Va. 337.

HOLT, PRESIDENT:

The plaintiffs, C. P. Ford & Co., of Rochester, N. Y., sued defendants, J. Friedman & Co., general retail merchants of Point Pleasant, W. Va., before a justice, for a part of a bill of shoes sent on order, and on the 19th day of October, 1893, obtained a judgment for one hundred and sixty nine dollars and ten cents, with interest from that date.

Defendants appealed to the Circuit Court of Mason county, and, neither party requiring a jury, the whole matter of law and fact was submitted to the court; and the Circuit Court, having heard all the evidence, was of opinion that plaintiffs were not entitled to recover, whereupon the plaintiffs moved the court to set aside the findings and grant them a new trial; but the court, on the 30th day of November, 1893, overruled the motion, and gave judgment for defendants, to which ruling the plaintiffs excepted, and brought the case here by writ of error.

The bill of exceptions sets out all the evidence, from which the undisputed facts are as follows: Some time in December, 1892, Mr. Marshall, a salesman of plaintiffs, came to defendants' place of business in Point Pleasant, and took from them an order for about one thousand dollars worth of shoes for the spring trade of 1893. Defendants, being then too busy to make out a list of quantities and sizes, agreed to send by mail the quantities and sizes wanted on the order. On the 13th day of January, 1893, plaintiffs wrote to defendants as follows: "Our salesman Mr. Marshall sent us a mem. order from you, stating that you would send for what goods you would require for spring shipment later. As we have such a large number of orders to make for spring, we would be pleased to have yours as early as possible, to give us plenty of time to make and ship to you without delay." On the 24th day of January, 1893, defendants wrote to plaintiffs, giving quantities and sizes wanted on their order. By letter of 27th January, 1893, plaintiffs acknowledged the receipt thereof, and say: "As requested, we will make and ship these goods at

once." On the 3d day of March, 1893, plaintiffs made shipment of part of the goods ordered, amounting in value to six hundred and ninety four dollars and thirty eight cents. These came to hand, and were accepted by defendants, about the 6th day of March, 1893. Defendants, after opening the goods, and finding those they most needed not among them, wrote to plaintiffs that they need not send the rest. Some time after that, but before the 8th of April, plaintiffs' salesman Mr. Marshall was again at Point Pleasant, soliciting from defendants another order. They told Mr. Marshall that they had not yet received all the goods of their first purchase; that it was then too late, and they did not want them. Mr. Marshall told defendants, if they came, not to accept them, but to ship them back.

On the 8th day of April, 1893, plaintiffs made another shipment on the original order, amounting to one hundred and sixty two dollars and thirty cents. Leaving out of view the sending by express, on the 29th day of April, one pair of shoes, charged at three dollars and twenty five cents, these are the goods in controversy. This shipment of one hundred and sixty two dollars and thirty cents was, in some way not explained, delayed on the railroad, not reaching Point Pleasant until the 22d day of April. The invoice, however, had reached defendants by mail, and they had made frequent inquiry at the depot for the goods. On the 18th day of April plaintiffs shipped to defendants another part of the original order, this amounting to forty four dollars. On the 20th day of April, 1893, defendants wrote to plaintiffs saying, in post-script, that they would be compelled to return their last invoice, meaning the one of one hundred and sixty two dollars and thirty cents, as it was too late to be getting them then. This letter is as follows:

"Point Pleasant, W. Va., April 20, 1892.

"Messrs. C. P. Ford & Co., Rochester, N. Y.

"Gents:

"We send you inclosed check for six hundred and ninety four dollars and thirty eight cents, per our account in full, less five *per cent.* and 45 ex. Please acknowledge receipt, and oblige, yours, truly, J. Friedman & Co.

"P. S. Gents: We will be compelled to return your last invoice, as it is too late to be getting them in now."

On the 22d day of April, 1893, the shipment amounting to one hundred and sixty two dollars and thirty cents reached the depot at Point Pleasant, and on the same day or early the next morning, the drayman brought them to the store of defendants, saying, "There are the two boxes of goods or of slippers that you have been looking for so long." Defendants told him that they did not want them, and he took them back to the depot. When the shipment of 18th of April came to hand does not appear, but we may infer about the same time. These goods of 18th of April were accepted, and some time after paid for. On the 24th day of April, 1893, plaintiffs received defendant's letter of 20th of April, and at once replied by letter of April 24, recognizing defendants' right to return the goods, as they had said they would do, but asking them to keep the shipment, and they would give defendants an extra dating on the same thirty days. This letter is as follows:

"(Dictated.)

"Rochester, N. Y., April 24th, 1893.

"J. Friedman & Co., Point Pleasant, W. Va.

"Gentlemen:—

"Inclosed find herewith a receipt for your remittance of the 20th inst. We notice that you say in your letter of remittance that you will be compelled to return goods to our last invoice on account of its being too late to receive now.

"We regret exceedingly that you should be compelled to do so. We have been doing our best with all our customers this season to get their goods through on time as nearly as possible. Owing to the new lasts and patterns this season which we have had to get out, with large numbers of orders received, it has been impossible for us to get out the patterns and do any better than we have for our customers. We ask you, with this explanation, to be lenient with us; and if you will keep these goods on your last shipment, we will give you an extra dating on the same of thirty days. We do not carry any goods in stock; and have no way of disposing of goods

except at considerable loss. Awaiting the favor of your reply, we remain, yours, truly,

"C. P. Ford & Co."

This shipment of 8th of April of one hundred and sixty two dollars and thirty cents was never reconsigned or sent back to plaintiffs, but was left in the depot, where it still was on the nineteenth day of October, 1893, when this suit was instituted. On the 11th day of May, 1893. C. M. Whittier, depot agent, wrote to defendants about this lot of goods and two others, as follows:

"May 11th, 1893.

"J. Friedman & Co., City:

"Gentlemen:—

"We are holding three different lots of goods refused by you on account of coming in late, and in the future will have to refuse same back after leaving freight house, except you take up in the regular way the expense bill, re-mark and re-con-sign in the regular way to be returned, when we will advance the charges if guaranteed. We take this action in order to avoid holding goods in our freight house so long for disposition, as we have no authority to return to consignor without a regular course we have to follow in cases of this kind, which compels us to carry shipments two or three weeks, or two or three months, and sometimes longer. Hoping you will not consider this notice too stringent, and see the position we are placed in, I am, as ever, your obedient servant.

"Resp't yours,

"Signed.

"C. M. Whittier, Agent."

Defendants returned to plaintiffs their statement of June 15th, with remark that plaintiffs' invoices of 8th of April and 29th of April (one pair of shoes, three dollars and twenty five cents) had been returned to them. On the 21st day of June, 1893, plaintiffs sent defendants the following letter:

"(Dictated.)

"June 21, 1893.

"Messrs. J. Friedman & Co.,

"Point Pleasant, W. Va.

"Gentlemen:—

"We have just received from you our statement of June

15th, returned with remark that our invoices of April 8th and 29th had been returned to us. We find in looking up the correspondence that you wrote to us April 20th that you would be compelled to return our last invoice to us, as it was too late for them, and we replied on April 24th, asking you to keep the goods on your last shipment, and that we would give you an extra dating on them of thirty days' time. We heard nothing from you in regard to this matter until you returned our statement of May 25th, with remarks that invoices of April 8th and 29th had been returned to us, and that you would send a tracer after them. We have never received the shoes from you, and the above is all the correspondence we have ever received from you in regard to the same. Of course, we can not credit the goods to your account until they have been delivered to us. If you will have the kindness to have tracer sent and find where the goods are shipped to, and also send us bill of lading of the shipment, we will endeavor on our part, from this end, to keep trace where the goods were sent. They may have been returned through mistake to some other firm in this city or some other city. Hoping this explanation will be satisfactory, and awaiting the favor of your reply, we remain, very truly yours,

"C. P. Ford & Co."

To which the defendants sent the following reply, of June 24, 1893:

"C. P. Ford & Co.—Gents:

"Yours to hand, and will state that we have already sent another tracer after the goods returned to you, which you claim you have not received, as per request.

"Yours, truly,

"J. F. & Co.

"Point Pleasant, W. Va., June 24th, '93."

On 24th July, 1893, defendants sent to the plaintiffs the following letter:

"Point Pleasant, W. Va., July 24, 1893.

"Messrs. C. P. Ford & Co., Rochester,

"Gentlemen:

"In reply, your statement 20th inst., in which you request to make out a bill against the R. R. Co. for your bill April 8th

and 29th, will say the position we are in, exactly as we wrote you 20th April, that the goods came too late for us, and we never expected same, and told the agent here to return same. We to-day went to the Ohio R. R. office, and told them to send tracer after those goods, and the reply we have received that the goods is still here at the depot. So you can order the goods back from the R. R. Co., or you can let us know and we shall attend to it for you.

"Yours, truly, J. Friedman & Co.

To this letter plaintiffs replied, on 1st of August, 1893, as follows:

"(Dictated.)

"Rochester, N. Y., Aug. 1st, 1893.

"Messrs. J. Friedman & Co.,

"Point Pleasant, W. Va.,

"Gentlemen:—

"Your letter of July 24th was received during the writer's absence from home. We need hardly say that we were greatly surprised to receive a letter from you at this late day to the effect that bill of goods shipped to you April 8th were still at the depot in your place, and that, if we wished you to do so, you would have the goods ordered back. To write such a letter after having written to us several times that you had sent tracer to show delivery of the goods in Rochester is certainly contrary to the letters previously received from you. To repeat what we have already written you in our letter of June 21st, you advised us on April 20th that you would be compelled to return the goods in our last invoice. We wrote you on April 24th, asking you to keep the goods and that we would give you an extra dating of thirty days on last shipment. We heard nothing from you until you returned our statement of May 25th, with remarks that invoices of April 8th and 29th had been returned to us, and that you would send tracer after them. We wrote you in reply to that letter that we had never received the shoes from you; in regard to the matter that we, of course, could not credit the goods to your account until they had been delivered to us; asked you to have the kindness to send tracer to find where the goods were shipped to, and to send us a bill

of lading of the shipment, and that we would endeavor on our part, from this end, to help trace where the goods were sent, thinking they might have been returned through mistake to some other firm in this city. In reply to that, you wrote us on June 24th, stating: 'Yours to hand, and we have already sent another tracer after the goods returned to you, which you claim you have not received, as per your request.' Not hearing anything further from you, on July 20th we notified you that it being too late in the season to dispose of these goods to any other parties except at a large loss, and as you had been unable to trace these goods and show delivery to us, we must ask you to collect the amount from the railroad company. Notwithstanding your letter of July 24th, this is the way the matter now stands, and we must hold you responsible for goods shipped to you on April 8th and 29th. From what we have written you cannot say, nor would any one else say, but what we have done what is right in taking this position. When you first informed us that the goods arrived too late, we advised you that we would give you thirty days' extra time. You did not reply for more than one month. You then wrote us that you had returned the goods. We wrote you within three days for you to send a tracer. We hold several communications from you since that time, saying that you have sent a tracer to show the goods had been returned to us. As we expect to do what is right by our customers, we certainly shall hold them to giving us the same kind of treatment. We could not accept the goods if they were returned to us at this time, either by you or the railroad company, as we are in no way to blame in the matter, and have abundant evidence to prove the same.

"Very respectfully yours,

"C. P. Ford & Co."

- The one pair of shoes sent by express on the 29th day of April, in completion of the order, we may infer, defendants say were returned by mail; but they never came to the hands of those who had sent them. Other letters passed that are in the record, but they bring out no new facts, and throw no light upon the points in controversy, which are purely legal.

Counsel for plaintiffs, C. P. Ford & Co., in the presentation

and argument of their case, make three points: *First*, That upon the delivery of the goods to the common carrier, they became the property of defendants, J. Friedman & Co., and were beyond the control of plaintiffs, except as to right of stoppage *in transitu*, which right exists only when the consignee is insolvent. To weed out the irrelevant as we go, no such right of stoppage exists or is claimed in this case. *Second*, Defendants are liable because they failed to return the goods within a reasonable time. *Third*, Defendants did not notify the plaintiffs within a reasonable time of their refusal to accept and pay for the goods.

For the purposes of this case, to avoid repetition and promote clearness of meaning, the term "delivery" will be used in the sense of transfer of possession; the term "receive," in the sense of receiving the possession; and the term "accept," in the sense of receiving the possession with the intention of retaining the goods, in performance of the contract of sale. See Tied. Sales, §§ 114, 115.

A delivery to the common carrier for transportation to the purchaser is a delivery to the purchaser, unless a contrary intent appears. The carrier receives as the agent of the purchaser. But the proposition cuts no figure in this case, for the following reasons: *First*, The goods were by the contract of sale to be sent as one assignment as a whole, at one and the same time, and not by installments. *Second*, They were to be made and shipped at once, "for the spring trade." The term "at once" is not to be taken literally, for that would be unreasonable, seeing that the goods had to be manufactured before they could be sent; but the term indicates that a prompt making and sending of the shoes was expected on the part of the buyer, and promised on the part of the maker and seller. One of the defendants, examined as a witness, says: "The custom was that in such cases you would get the shoes within two or three weeks." Evidence is admissible to show what the parties thought about the time of performance. See Tied. Sales, § 100. What is a reasonable time in such a case depends upon the facts of the particular case, and, as they were ordered for the spring trade, plaintiffs were bound by their contract to make and

ship them at least as early as the opening of spring—that is to say, about the 1st of March; certainly not later than the 6th day of March, the date of receiving the first consignment. Instead of sending the full order at that time, plaintiffs undertook to send them by installments; and, instead of sending them at once, deferred shipping the goods in controversy until the 8th of April; and by some delay, not explained, they did not reach their destination until the 22d day of April, when spring was then almost two-thirds gone. But we need not pursue further this branch of the case, for plaintiffs, after having received defendants' letter of 20th April, in which they say they will be compelled to return this last invoice, wrote in reply their letter of 24th of April, in which they recognize defendants' right to return these goods on account of their being sent and received too late to be accepted, and in the same letter offer to give defendants an additional credit of thirty days if they will keep the goods. Now came the time of the defendants to speak and to act. Goods had been sent to them on their order, which came to hand out of season, too late, and they notified the seller and consignor that they would be compelled to return them. The consignor says in reply: "We concede your right to return the goods, but regret exceedingly that you feel compelled to do so. We have been doing our best to get the goods of our customers through on time, as nearly on time as possible. Owing to the new lasts and patterns this season which we have had to get out, with the large number of orders received, it has been impossible for us to get out the patterns and do any better than we have for our customers. We ask you, with this explanation, to be lenient with us, and, if you will keep these goods, we will give you an extra dating on the same of thirty days. We do not carry any goods in stock, and have no way of disposing of them except at a considerable loss." Did the defendants return the goods as they said they would be compelled to do, re consign and reshipe them? Or did they, within a reasonable time, notify the consignor that they would not accede to his last proposal to keep the goods? They knew the goods were in the depot, for the agent pointed them out, asked them by let-

ter to reconsign them if they did not intend to accept them. They did not even answer the plaintiffs' letter containing the new proposal until after more than thirty days had elapsed. During this time they had received and accepted the forty four dollar shipment made on the 18th day of April, ten days after the one in controversy; and when they did answer, by returning to plaintiffs their statement of account sent on the 25th day of May, it was accompanied with the remark that the invoices of 8th April and 29th April (the goods here sued for) had been returned to plaintiffs, and they would send a tracer after them; and, when the goods had failed to come to the plaintiffs, they wrote to defendants on the 21st day of June, requesting them to send to plaintiffs the bill of lading of the reshipment. Instead of sending the bill of lading as requested, they sent a letter of 24th June, saying that they had sent another tracer. Finally, on the 24th of July, 1893, they mailed to plaintiffs the letter saying "the goods are still here at the depot." A strange letter, in view of the fact that the depot agent, by letter of 11th May preceding, had requested defendants to re-mark and reconsign the goods which they had refused to accept, which remarking and reconsignment defendants, though both examined as witnesses, make no claim of ever at any time having made, or of authorizing any one to make for them.

Upon the facts as they appear by this record, there can be but one conclusion: Such delay on the part of defendants, unexplained, was not reasonable, and such conduct was not consistent with the requirements of fair dealing, and on both grounds the law holds them liable for the goods as purchasers thereof. See *Bartholomae & Co. v. Paule*, 18 W. Va. 771; *Thompson v. Douglass*, 35 W. Va. 337 (13 S. E. Rep. 1015). Not having rejected plaintiffs' proposal to keep the goods within a reasonable time after they came to the depot, and not returning them as promised, they are presumed to have accepted them. See *Tied. Sales*, § 115. Actions may speak louder than words. Defendants not only made no reply for more than thirty days to plaintiffs' proposition that they should keep the goods in controversy, on an additional credit of thirty days, but during that time received and accepted

the installment of shoes shipped on the 18th day of April. This amounted to their assent to keep the shipment of 8th of April, which came to the depot on the 22d of April, which they said they would return, but did not return; and when at length, on the 21st day of June, they notified plaintiffs by mail that they had returned them, they sent no bill of lading, did not return them, but knew they were then lying in the depot, and that they were not returned, because they had failed and refused to re-mark and address them, in order that they might be returned.

The judgment must be set aside, and judgment be rendered for the plaintiffs.

CHARLESTON.

STEWART v. OHIO RIVER R. Co.

Submitted January 15, 1895—Decided February 2, 1895.

1. **MASTER AND SERVANT—ORDINARY HAZARD.**

When a servant enters into the employment of a master, he assumes all the ordinary hazards incident to the employment, whether the employment be dangerous or otherwise.

2. **MASTER AND SERVANT—NEGLIGENCE—EMPLOYMENT.**

The test of liability is the negligence of the master, not the danger of the employment, though the danger of the employment may determine the ordinary care required in the case.

3. **MASTER AND SERVANT—NEGLIGENCE.**

The mere fact of injury received raises no presumption of negligence on the part of the master.

4. **MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE.**

When a servant willfully encounters dangers which are known to him, the master is not responsible for an injury occasioned thereby.

5. **MASTER AND SERVANT—DILIGENCE AND CARE.**

A servant having knowledge of danger about him must use diligence and care in protecting himself from harm.

6. **MASTER AND SERVANT—PATENT RISKS.**

An employer does not impliedly guarantee the absolute safety

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of his employees. In accepting an employment, the latter is assumed to have notice of all patent risks incidental thereto, or of which he is informed, or of which it is his duty to inform himself, and he is further assumed to undertake to run such risks.

VINSON & THOMPSON for plaintiff in error, cited 36 W. Va. 397; Bish. Non-Cont. Law, § 665; 100 U. S. 213; 129 Mass. 268; 45 Am. Rep. 598.

W. W. MARCUM and MARCUM, PEYTON & MARCUM for defendant in error, cited 30 W. Va. 798.

ENGLISH, JUDGE:

This was an action of trespass on the case brought on the 17th day of June, 1893, in the Circuit Court of Wayne county, by T. H. Stewart against the Ohio River Railroad Company, to recover ten thousand dollars damages, to which the plaintiff claimed to be entitled by reason of injuries received by him in consequence of being thrown from a hand car on which he was riding and helping to operate, which accident he claims was caused by the negligence of the section foreman, who was riding on the same hand car, in suddenly applying the brakes, thereby causing said hand car to suddenly stop, which resulted in throwing the plaintiff off in front of the hand car, and in his being run over thereby. The defendant pleaded not guilty, and issue was thereon joined, and the cause was submitted to a jury, and after all the evidence was heard the defendant demurred thereto, and the plaintiff joined therein, and the jury, in pursuance of the direction of the court, ascertained the plaintiff's damages to be five thousand dollars, subject to the opinion of the court upon the defendant's demurrer to the evidence; and upon consideration the court overruled said demurrer, and the defendant also moved the court to set aside said verdict and finding of the jury, because the damages assessed were excessive and not warranted by the evidence; which motion the court overruled, and the defendant excepted, and judgment was rendered upon said verdict, and the defendant obtained this writ of error.

It appears from the testimony in the case that the plain-

tiff had been in the employ of the defendant company a month, or a little over, as a section hand, and that he and other hands were in the habit of traveling to and from their work on the track with Mr. Ellis, the section foreman.

On the occasion when this injury was sustained, the section hands had finished their day's work, and seven of them, including the foreman, Ellis, got upon the hand car to return to the tool house. It was their custom to start from this tool house in the morning and return to it in the evening, and the plaintiff was in the habit of assisting at the levers in propelling the car.

According to the plaintiff's own statement as to his position on the hand car when it started for the tool house on that evening, he was in the center of the car. His heels were kind of over the edge, for he lost his balance, and didn't have any chance to support himself, and fell in front of the hand car. He was riding backwards, and, at the time he fell off, was helping to run the car, and had hold of the lever, and when asked, "Did you see Mr. Ellis at the time he put the brake on?" answered, "I may have seen him, but don't remember it." The plaintiff further states that he was riding in front of the center, the brake was on the right-hand side, and the foreman, Ellis, was in an arm's reach of him. The brake was applied by pressing the foot upon the lever, and in answer to the question, "Where was the car, with reference to the tool house when Mr. Ellis applied the brake?" the plaintiff stated that the car had got past the tool house when he put the brake on. He knew it was the intention to stop the hand car at the tool house when they started home from their work; he was standing in such a position that he could see the movements of the foreman, Ellis, and had hold of the lever.

For eight or ten days he had been going out with this gang of section hands from the tool house in the morning and returning to it in the evening, and, knowing that the car was to be stopped at the tool house, what was the necessity for the foreman, under these circumstances, to announce the fact that he was going to apply the brakes, having arrived at the tool house, and all hands being aware that it was the

custom and intention on that occasion to stop there? It must be presumed the men stopped working their levers, and, in fact, J. W. Henderson, a witness for the plaintiff, when asked who stopped the car, answered, "Mr. Ellis stopped all he could, and I pulled up on the lever. Every time she would go to go down, I would hold it up." And in reply to the question, "Did he [meaning Ellis] give any warning to the crew that he was going to stop her?" stated, "No, sir; I did not hear it. They all knew they wanted to stop there at the tool house." He also stated that it was not usual, when they went to stop there, to say, "I am going to put on the brake." Everybody knew that the brake was going to be put on at the tool house; that no one had any particular place to work at the levers; that every fellow got his place, catch as catch can. This witness also states that he saw the plaintiff falling; he had let loose of the lever; and he thinks his foot slipped right off, and then his other foot caught the car, and it just doubled him right up and ran over him. If, then, the law should regard this foreman or section boss as the vice principal or *alter ego* of the defendant company on this occasion, what did he say or do that would render the defendant liable? The plaintiff took his position on the hand car without any direction from the foreman. When he did so he was fully aware of the destination of the car, he knew where the brakes would be applied, and the foreman, who stood at the brake, was in his immediate presence, so that nothing but his negligence prevented him from having notice of his every movement; he was himself assisting in giving speed to the car, and must have known the swiftness with which it was moving by the action of the levers, and yet he stood, according to his own statement, with his heels projecting from the platform, at the very moment the tool house was reached and the brakes applied, and when he knew they would be applied.

What negligent act could be attributed to the foreman on this occasion is difficult to discover from the evidence. The plaintiff's witness Henderson says: "We always went pretty fast," and when asked, "Was there any difference be-

tween the rate of speed on that and on any other evening?" replied, "I think we went a little faster on account of the engine following us." But no witness states that the speed on that evening was increased by the direction of the foreman, and the speed was controlled by the action of the plaintiff and his fellow servants, who were working the levers. The same witness was asked, "When you were coming into the tool house was that the usual way of stopping the car?" and replied, "Yes, sir"; and when asked, "Stop suddenly?" replied, "Stopped as quick as we could." There was nothing, then, that the foreman did, except to use the brake in stopping the car, and the plaintiff's own witness tells the jury that the hand car was stopped in the usual way on this occasion, and the plaintiff appears to have ridden to the tool house often enough on this hand car to be acquainted with the manner of stopping it.

In the case of *Knight v. Cooper*, 36 W. Va. 232 (14 S. E. Rep. 999) this Court held that "when a servant enters into the employment of a master, he assumes all of the ordinary hazards incident to the employment, whether the employment be dangerous or otherwise;" that "the test of liability is the negligence of the master, not the danger of the employment, though the danger of the employment may help to determine the ordinary care required in the case;" that "the mere fact of injury received raises no presumption of negligence on the part of the master;" that "when a servant willfully encounters dangers which are known to him, the master is not responsible for an injury occasioned thereby;" that "a servant having knowledge of danger about him must use diligence and care in protecting himself from harm." In the case of *Engine Works v. Randall*, 100 Ind. 293, the supreme court of that state holds that "where both master and servant have equal knowledge of the danger of the service required, and the means of avoiding it, and the servant, while engaged in the performance of the work he is set to do, is injured by reason of his own inattention and negligence the master is not liable." Bailey, in his work on Master's liability for Injuries to Servant (page 219) in speaking of the duties of the master, states the law thus: "He must not only

give the servant warning of danger, but he must also give him such instruction as will enable him to avoid injury, unless both the danger and means of avoiding it while he is performing the service required are apparent. But he is not bound to anticipate extraordinary, unusual, or improbable occurrences which involve inattention on the part of the servant." This Court held in the case of *Johnson v. Railway Co.*, 38 W. Va., page 207, (18 S. E. Rep. 573) that "an employe having knowledge of the danger about him must use prudence and care to protect himself from harm, and if he willfully and imprudently encounters such danger the employer is generally not responsible for the injury caused thereby." Patterson, in his work on Railway Accident Law, section 316, states the law as follows: "There is no implied obligation upon the part of the master to indemnify the servant against the ordinary risks of the service, and the servant, when injured, can only recover upon proof that the master knew of a danger which was unknown to the servant, and which the master did not make known to him." So in the case of *Sykes v. Packer*, 99 Pa. St. 465, it was held that "an employer does not impliedly guaranty the absolute safety of his employes. In accepting an employment, the latter is assumed to have notice of all patent risks, incidental thereto, or of which he is informed, or of which it is his duty to inform himself, and is further assumed to undertake to run such risks;" and also in the case of *Naylor v. Railway Co.*, 33 Wis. 661 (11 N. W. Rep. 24) it was held that "if a servant knowing the hazards of his employment as the business is conducted, is injured while engaged therein, he can not maintain an action against the master for such injury merely on the ground that there was a safer mode for conducting the business, the adoption of which would have prevented the injury." It is true that the hand car might have been run slower, and if such had been the case the injury might not have resulted, but the defendant in error can not be heard to complain of the speed of the car for two reasons: First, because he, without any directions from the foreman, so far as appears from the evidence, was assisting in working the levers which gave the car its velocity; and, secondly,

because he had been working as a section hand on the road for a month and, for eight or ten days had been traveling upon this hand car to and from his work, and knew the speed with which it traveled, and, possessing this knowledge, he voluntarily took a dangerous position upon the car, standing on the front edge of the platform, facing to the rear, and with his heels projecting over the edge of the platform. Occupying this position, and being acquainted with the facts in regard to the speed of the car, and its sudden manner or stopping when it reached the tool house on each successive day, he must be regarded as assuming the risk attendant thereon, and, the evidence disclosing no negligent act on the part of the foreman, my conclusion is that the Circuit Court erred in overruling the defendant's demurrer to the evidence and in rendering judgment upon the verdict.

The judgment complained of is therefore reversed, and, this Court proceeding to render such judgment as the court below should have rendered, the demurrer to the plaintiff's evidence is sustained, and judgment is rendered for the defendant, with costs, *etc.*

CHARLESTON.

WILLIAMSON v. CLINE *et ux.*

Submitted January 10, 1895—Decided February 2, 1895.

1. WIFE'S SEPARATE ESTATE—MARRIED WOMAN—PERSONAL JUDGMENT—JURISDICTION.

By reason of Chapter three, Acts 1893, a court of law has jurisdiction to entertain an action and render personal judgment against a married woman upon a contract made during coverture, binding her separate estate.

2. WIFE'S SEPARATE ESTATE—MARRIED WOMAN—BOND—SURETY.

A bond executed by a married woman as surety for a debt of her husband is valid to bind her separate estate.

3. WIFE'S SEPARATE ESTATE—MARRIED WOMAN—CONTRACT.

A contract of a married woman, made since the enactment of

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chapter 3, Acts 1893, such as binds her separate estate, may be enforced against her separate estate, whether owned by her at the time of the contract or afterwards acquired, the same as if she were a *jeme sole*.

4. WIFE'S SEPARATE ESTATE—JUDGMENT—CONTRACT.

A judgment on such contract under said act binds as a lien the *corpus* or entire body of her estate in realty owned by a married woman.

5. VALUABLE CONSIDERATION—FORBEARANCE TO SUE.

Forbearance to sue being valuable consideration, if a creditor take from his debtor and a surety a note giving further time for payment, that is a valid consideration to bind the surety.

6. VALUABLE CONSIDERATION—"FOR VALUM RECEIVED."

The words, "for value received," in a note, *prima facie* establish a valuable consideration, where it becomes necessary to prove such consideration.

7. OBLIGATION UNDER SEAL—FAILURE OF CONSIDERATION.

An obligation under seal imports valuable consideration, requiring no proof of the consideration, and neither at common law nor under section five, chapter one hundred and twenty six of the Code can want of consideration be shown in defense of an action on it. But, as to failure of consideration, that may, under that section be shown, though not at common-law. There is a difference between want and failure of consideration in such case.

8. MARRIED WOMAN—WANT OF CONSIDERATION—OBLIGATION UNDER SEAL.

A married woman may, in an action at law or in equity, plead want of consideration against a sealed obligation given by her during coverture.

9. OBLIGATION UNDER SEAL—MERGER.

Taking an obligation under seal for a simple contract debt merges it in the obligation, and thus extinguishes it, as the taking of a security of higher dignity extinguishes inferior securities for the same debt.

N. C. PRICKITT for plaintiff in error, cited Code of 1868, chapter 66, page 447 (Code 1887, chapter 66 same); Acts 1891, Ch. 109 (Code 1891, Ch. 66 is same); Acts 1893, Ch. 3, 43; Constitution, Art. VI, Sec. 43; 14 Gratt. 24, 27; 19 W. Va. 366; 13 W. Va. 572; 12 W. Va. 587; 23 W. Va. 236; 10 W. Va. 171; 20 W. Va. 571, 580; 21 W. Va. 658; 29 W. Va. 385; 22 W. Va. 708; 38 W. Va. 404 (18 S. E. Rep. 561); West Va. Bar, No. 10 (Nov. 1894) p. 231; 21 W. Va. 626; 13 W. Va. 609; 3 W. Va. 561; 5 Rob. Prac. 606, 611; 1 Dan-

iel's Neg. Inst. chap. 7, § 161, p. 165; 3 Am. & Eng. Ency. of Law 836, 831, n. 3; 1 Waits Action & Def. p. 91, 96, § 6.

J. A. WOODDELL for Margaret Cline defendant in error.
Enactment of separate property acts do not give married women capacity to contract generally.—15 S. E. Rep. 997; 14 Am. and Eng. Ency. 609 note 8; 18 Am. Rep. 607; *Id.* 615; 20 W. Va. 579; 22 W. Va. 708, 714.

Not liable at law upon her suretyship contracts unless such contracts are authorized by statute.—25 Am. Rep. 141; 10 Neb. 83, 86; 58 Am. Rep. 268, 269; 7 L. R. A. 211; 63 Ill. 59, 60; 75 Ill. 574; 13 W. Va. 608.

Not authorized to contract generally by reason of enactment of s. 15, c. 3, Acts 1893.—ss. 13 and 15, c. 3, Acts 1893; 1 Am. Rep. 601; 10 W. Va. 171.

No indebtedness created unless she owns separate property or has separate business.—24 Am. St. Rep. 702.

Writing obligatory sued upon void as to Mrs. Cline.—13 W. Va. 609; 19 W. Va. 391.

BRANNON, JUDGE:

Eunice Williamson brought an action of debt in the Circuit Court of Jackson county against Samuel Cline and Margaret Cline, based on a single bill, made September 16, 1893.

Margaret Cline came in with a plea to the effect that when the single bill was executed she was the wife of Samuel Cline, living and cohabiting with him, and still so remained; and that she never received any consideration for which the single bill was executed, and she did not, at the execution of it, owe the plaintiff; and that the debt was one of her husband's, contracted for his sole use and benefit, prior to the date of single bill; and that she was only surety for him in said single bill. Objection was made to this plea, but it was overruled, and the plea received, but no replication was made to it, and judgment was rendered against the husband for the debt, but in favor of Margaret Cline absolving her from the debt.

Eunice Williamson brought this writ of error.

The sole question is whether the married woman was lia-

ble under this single bill. If she was, the plea of coverture filed by her was no bar to the action, and the court erred in overruling the plaintiff's objection to it, and in rendering judgment upon it in her favor; and, if she was not liable, the plea was properly received, and judgment rendered upon it. *Duval v. Malone*, 14 Gratt. 24, 27.

What is commonly called the "Married Woman's Act" has undergone material legislative amendment since its first enactment in chapter sixty six of the Code of 1868. Up to the enactment of chapter three, Acts 1893, a court of law had no jurisdiction to render judgment upon the contract of a married woman, and the plea of coverture filed in this action would have at once ousted the law court of the case. Only a court of equity had jurisdiction to enforce against her separate estate such contracts as bound it. *White v. Manufacturing Co.*, 29 W. Va. 385 (1 S. E. Rep. 572). And, in absence of a specific lien by deed of trust or for purchase money, not the *corpus* of her real estate, but only its issues during coverture, could be subjected in equity, and there could be no personal decree against her even in equity. *Hughes v. Hamilton*, 19 W. Va. 366, points 10, 12; *Turk v. Skiles*, 38 W. Va. 404, point 4 (18 S. E. Rep. 561). While her personal property could be sold outright for debts under contracts that bound it, yet it could not be done by judgment at law and execution, as in the case of persons generally, but only in equity. You could not subject the smallest item of her chattels without resort to an expensive chancery suit. This was a serious inconvenience to her creditors, even a prejudice to herself. So far as concerns the jurisdiction of courts of law to enforce her contracts against her separate estate, section fifteen of chapter sixty six of the Code, as found in chapter three, Acts 1893, makes a radical revolution. By it a "married woman may sue and be sued in any court of law or chancery in this State, which may have jurisdiction of the subject-matter, the same in all cases as if she were a feme sole; and any judgment rendered against her in any such suit shall be a lien against the *corpus* of her separate real estate, and an execution may issue thereon and be collected against the separate personal property of a mar-

ried woman as though she were a feme sole." Under this section her status or condition of coverture has no influence upon jurisdiction. It depends on the subject-matter. If that be such as is cognizable at law, she may be sued in a court of law like any one else; if cognizable in equity, she may be sued in equity. Hence, as to jurisdiction of the court to entertain this suit, as the court of law had jurisdiction of debt upon a single bill for a specific sum of money, the plea presented no bar.

But does the single bill, executed by the wife, not for any consideration benefiting her or her separate estate, but only for a debt of her husband as his surety, bind her? It is urgently insisted that it does not. What contracts bound a married woman's separate estate under the law as found in chapter sixty six in the first edition (1868) of our present Code, before its amendment and re-enactment in chapter three, Acts 1893, our present law on the subject? What contracts, I repeat, bound a wife's separate estate under the Code of 1868? I need not and ought not enter into a wearisome discussion of this subject, for our function in these days upon this subject, as upon many other subjects, is to apply the doctrine of *stare decisis*—stand to decisions, rather than enter into prolix disquisitions, admissible when the questions were new, as if we were hewing out the way through an untouched forest. Courts have widely differed as to what kind of contracts bound separate estate, and elaborate discussion has been given the subject elsewhere and in this State. It was settled, under the separate estate chapter in the Code of 1868, by the cases of *Patton v. Bank*, 12 W. Va. 587; *Radford v. Carwile*, 13 W. Va. 572; *Hughes v. Hamilton*, 19 W. Va. 366; *Camden v. Hiteshew*, 23 W. Va. 236; and *Dages v. Lee*, 20 W. Va. 584—that a married woman, as to separate estate, is regarded as a single woman, with right to dispose absolutely of her personalty, and of the rents and profits of her realty during coverture, as if single; that this right of disposal (*jus disponendi*) is an incident to the very ownership of separate estate; and that the liability of such estate to all her debts incurred during coverture is also an incident to such ownership, making her personalty and the

rents and profits during coverture, but not the corpus of her realty, liable for such debts. Under the law as so settled in this State, all debts contracted by a married woman so bound her separate estate, no matter out of what transaction arising, just the same as if she were single, except a bond or covenant based on no consideration. It was not necessary, to bind her estate for her debts that the consideration inure to her own individual benefit, or of her separate estate, as if it inured to the benefit of her husband, or any third party, or to the prejudice of the person contracting with her, it was sufficient as a consideration; but to bind her estate for the debt of another she must do so by writing, signed by her. Thus she could bind her estate as surety for her husband. Then, according to the law as it was under the original chapter sixty six of the Code, the single bill in this case would have bound the separate estate of Margaret Cline.

Has subsequent legislation changed it? The act of March 14, 1891 (Acts 1891, c. 109) amending and re-enacting chapter sixty six of the Code, did make section twelve of that chapter work radical change in the law, as above stated, touching the obligation of a married woman's contracts upon her estate, limiting their validity and obligation to certain cases therein specified, and thereby narrowing very much her power to bind her separate estate by contract; but I need say nothing more relative to that act, because the single bill involved in this case was not executed while it was in force, and it was repealed by the amendment of Code, chapter sixty six, by Acts 1893, chapter three. What, then, is the effect of the last named act upon the power of a married woman to subject her separate estate by contract to debts? Did it narrow her power to do so? Its purpose not to narrow, but to widen the liability of her estate is spoken by both letter and spirit of the act. Her capacity to contract and bind her estate has been for years, under legislation and decision here and elsewhere, save the act of 1891, widening, and this last act breathes the spirit of the intention of the legislature to make her, in this regard, a single woman, as it subjects her personalty to the jurisdiction of courts of law and equity, and to their judgments and decrees, and makes them bind

the absolute estate or *corpus* of her realty, and subjects her personalty to execution, just as if she were single; thus making change in expansion, not restriction, of her liability under the law as it was aforetime. This act of 1893 does not say in words just what contracts bind her estate. Neither did chapter sixty six, as first enacted, and as it was when construed by the cases of *Patton v. Bank* and others cited above, fixing her capacity to charge her estate under that chapter. This act of 1893 omitted, and thus repealed, the restrictions upon her capacity to bind her estate created by the act of 1891; thus manifesting the legislature's dissatisfaction with those restrictions. And the act of 1893 continued the capacity of the wife to take and hold separate estate and her *jus disponendi* or power of disposal as fully as they existed from the first enactment of chapter sixty six, and as the power to charge her separate estate with debt is an incident or consequence of her power to hold and dispose of separate estate, it follows that she may still charge her separate estate as pointed out in the cases above cited. Nay, more, the act made her debts bind the *corpus* of her real estate, whereas only its rents and profits could be subjected before that act; and it wiped out the limitations or restrictions imposed by the act of 1891 upon her power to charge her separate estate with debt, signifying an intent to increase, rather than lessen, her power. It is the capacity to own and dispose of her property that gives birth to her ability to charge it with debt. Neither of those capacities gives her ability to contract at law, as law, without statutory mandate to do so, knows not her separate estate nor power to contract. Though her title to her estate is, under our statute, a legal estate, she did not have power to contract at law, her contracts binding her estate and being enforceable against it only in equity. *Pickens' Ex'rs v. Kniseley*, 36 W. Va. 794, 798 (15 S. E. Rep. 997) and cases cited; opinion in *Carey v. Burruss*, 20 W. Va. 576. But that furnishes no argument now against the validity and full legal operation in a court of law of her note or bond or other contract, because the act of 1893 commands a court of law to render judgment upon it binding her estate, and that necessarily clothes her

with power to contract in the eyes of a court of law by contracts that would have been enforceable against her separate estate in equity.

It is contended by counsel that this new section fifteen of its own force gives married women as full power to contract as if single. There are some views that occur to me imparting force to this theory. No other section defines or limits her power to contract. The section says she may be sued in any court in all cases as if single, and any judgment against her shall be a lien on the *corpus* of her real estate; it thus seeming that the legislature intends to make her a single woman as to liability to civil suit, and for the same causes as if single. Saying she may be sued in all cases as if single appears to mean that any cause of action on contract which would bind an unmarried woman will bind a married one; and, being compared as to liability to suit with the single woman, why is she not correlatively measured by the single woman also as to her capacity by contract to subject herself to that liability? But further reflection induces me to the conclusion that the mission of this section is not to enlarge the woman's ability to contract, but only the remedies upon contracts binding her estate. Before the enactment of this section, justices' courts and all courts of law were powerless to enforce her contracts against her separate estate, and even equity could not subject the *corpus* of her estate to her debts; and the design and motive of this section were to remedy these evils by giving law courts, as well as chancery, jurisdiction over her estate, and to bind the corpus of her real estate by contracts which before bound only its rents and profits; and it was not the purpose to erect a new test of the validity of her contracts by making binding contracts not before binding. See *Fitzgerald v. Quann*, 109 N. Y. 441 (17 N. E. Rep. 354). But it is of no practical importance to the decision of this case that section fifteen does not enlarge the married woman's capacity to contract, since it is clear that the single bill in this case is binding on Mrs. Cline's separate estate, as the statute was before the passage of section fifteen, as expounded by this Court in cases above cited, and as it still remains; and, being valid, she can be sued at law upon it.

And, in general, it is not important, as, so far as I now anticipate, there are very few contracts which need the helping hand of such a construction of section fifteen to give authority to contract, seeing that decisions years ago declare that debts for which her separate estate may be held liable are such as arise out of any transaction out of which a debt would arise if she were single, except bonds without consideration. *Camden v. Hiteshew*, 23 W. Va. 236. But by said section fifteen other change is made in our law. Before it, no personal judgment or decree could be rendered upon the contract of a married woman; but in this respect, by that section, change is meant unmistakably by the very letter of the section's saying she may be sued "the same in all cases as if she were a *feme sole*, and any judgment rendered against her in any such suit shall be a lien against the *corpus* of her separate estate," and execution may issue against her separate personalty as if single. "Judgment against her" is the language. My present opinion is that a personal judgment against a married woman would bind all her estate owned by her at the date of the judgment or afterwards acquired, without regard to the date of the contract; whereas, until this section, it bound only property owned by her at the date of the contract. *Pickens' Ex'rs v. Kniseley*, 36 W. Va. 801 (15 S. E. Rep. 997); 2 Pom Eq. Jur. § 1123; *Ankeney v. Hannon*, 127 U. S. 128 (13 Sup. Ct. 206); *Crockett v. Doriot*, 85 Va. 240 (3 S. E. Rep. 128); *Lee v. Cohick*, 39 Mo. App. 672; *Pike v. Fitzgibbon*, 17 Ch. Div. 454; Wells, Mar. Wom. § 619; *Van Metre v. Wolf*, 27 Iowa 346. The legislature intended to make her pay her honest debts out of any property which she now owns or may come to own. Authorities I have met with on an examination of this point indicate that personal judgments are rendered and bind after-acquired property, just like judgments against persons in general, where statutes subject married women to judgments in courts of law. *Fabrique Co. v. Stanage*, 50 Ohio St. 417 (34 N. E. Rep. 410); *Whittaker v. Kershaw*, 45 Ch. Div. 320; *Bank v. Garlinghouse*, 53 Barb. 619; *Insurance Co. v. Babcock*, 42 N. Y. 613; *Van Metre v. Wolf*, 27 Iowa, 341; *Smith v. Dunning*, 61 N. Y. 251; *Miner v. Pearson*, 16 Kan. 28; *Kelly*, Cont. Mar. Wom. 283; Wells, Mar. Wom.

§ 619. As said in the Iowa case just cited, it seems to me that there is nothing in the statute to indicate that judgments against married women are different from personal judgments against others or have less force and effect as to her property, and therefore they may be enforced against after-acquired property; and the equity principle heretofore prevailing, that the decree can go only against the property before the court, and can not be personal, has ceased with this act of 1893. As chancery has been proceeding, there could be a decree only against the married woman's separate property before the court, and no personal decree (*Howe v. Stortz*, 27 W. Va. 555) but, of course, this doctrine can not apply now to actions at law under section fifteen, as an action at law, unless on attachment, will not proceed against specific property, personal or real; and there can thus be only the ordinary personal judgment as if the action were against a single woman. In *Peck v. Marling's Adm'r*, 22 W. Va. 708, as section thirteen, chapter sixty six, Code, allowed a married woman living separate from her husband to carry on business, her power to contract was thence implied, and she was subjected by mere implication to common-law action on such contract, whether she had separate estate or not when she made the contract. Of course, a judgment on the contract of such a woman would be personal, and, I take it, would bind after-acquired estate. Though I have indicated an opinion as to the effect of a judgment upon after-acquired property, it is by no means necessary to decide it, since we are dealing only with the question of whether the plea of coverture in this case answers or bars the action, not with the question of what property would be bound by judgment therein.

It is said in brief of counsel that the Circuit Court was of opinion that the language found in the statute that a married woman holds her separate estate free of her husband's control, and it is in no way liable for his debts, exonerates it from his debt, though she bind herself as surety for it, and that she can not go his security, as there is no consideration beneficial to her or her estate. I need only say, as to this, that our statute has from the first declared that a wife may

hold certain estate to her sole use, free from her husband's control and debts; but that language was only used to remove the common-law rule by which the husband, by marital right, acquired ownership of all her personalty, and the use and rents and profits of her realty during coverture, and was not used to say that she could not, by her own act, subject it to her husband's debt. The statute read in the same way in years gone by, when this Court held in *Radford v. Carwile*, 13 W. Va. 572, and *Dages v. Lee*, 20 W. Va. 584, and other cases, that a married woman, as surety for her husband or any one else could bind her separate estate by a writing, without any consideration moving to her or her estate, the benefit to the principal being sufficient. Should we sustain the theory mentioned, we would overrule numerous cases. But it is relied upon in the plea that the debt for which the single bill was given was an antecedent debt, due from the husband for money lent; not a new consideration. The answer to this is that the instrument extended the time one day for payment. It is well settled that though, to bind a surety, there must be some consideration, yet forbearance, postponement of payment is sufficient consideration. 1 Brandt, Sur. § 16; 3 Am. Eng. Enc. Law, 836; Metc. Cont. 199; 1 Whart. Cont. § 532; Bish. Cont. § 1266. It is true, indulgence of one day is short, but even that is in many cases salvation to the business character and success of a business man. If a pressing creditor agrees to forbear suit for even a day, it may enable the debtor to dispose of property, or get the help of a friend, or in some way save himself from ruin. And though the consideration be small, or even nominal, if it be appreciably valuable, it will be sufficient, and the court will not enter into the work of nicely weighing how small or valuable it may in fact have been. Parties have weighed these things themselves. *Lawrence v. McCalmont*, 2 How. 426, 452; *Davis v. Wells*, 104 U. S. 159; Brandt, Sur. § 13; 3 Am. & Eng. Enc. Law, 431.

This single bill gave indulgence for a fixed time, and thus tied the hands of the creditors from suit until its expiration, as even a mere promissory note, given for a pre-existing one, will. *Bank v. Good*, 21 W. Va. 455, point 3; *Hopkins v. Det-*

Miller, 25 W. Va. 734. But, as it is not a parol contract, but a specialty, it ended and merged the prior debt, so that suit could never be brought on that prior debt, but only on the single bill. Per Roane J., in *M'Guire v. Gadsby*, 3 Call, 237; 5 Rob. Prac. p. 808, Chapter 76; *McNaughten v. Partridge*, 38 Am. Dec. 731; *Van Vliet v. Jones*, 43 Am. Dec. 633; *Ladd v. Wiggin*, 60 Am. Dec. 551; *McDonald v. Ingraham*, 64 Am. Dec. 166; *Baker v. Baker*, 75 Am. Dec. 243.

It is contended by counsel that, as the single bill in this case recites that its promise is "for value received," that is *prima facie* evidence of valuable consideration, and repels the allegation of want of consideration in the plea. So the words are *prima facie* evidence of valuable consideration. Per Lee, J., in *Averett v. Booker*, 15 Gratt. 164; Daniel, Neg. Inst. § 161. But the trouble in front of that argument is that the plea is taken for true for want of replication, and, though the single bill would be evidence on that point, if there were issue on it, it is not under these circumstances. So it is argued that the seal imports consideration, and is evidence to deny the plea. So it would be, were there a replication.

It is argued by counsel that section fifteen enables a married woman to contract as a single woman and therefore that exception from her capacity to contract, stated in point 1 of *Hughes v. Hamilton*, 19 W. Va. 366, that her bond being void at law, she can show want of consideration, would cease, and she would come under the rule that a sealed instrument imports consideration, and its want can not be shown at law. 5 Rob. Prac. 606, 608; *Taylor v. King*, 6 Munf. 357; *Wyche v. Macklin*, 2 Rand. (Va.) 426; *Harris v. Harris*, 23 Gratt. 737; Metc. Cont. 3. Illegality of consideration in a sealed document may be shown at law, but not want of consideration, or failure of consideration, according to common-law principles. The statute (section five, chapter one hundred and twenty six, Code) changes the rule by allowing failure of consideration to be pleaded at law, but, not mentioning want of consideration, leaves that as at common law; so that neither at common law nor under section five, chapter one hundred and twenty six, Code, can want of con-

sideration be pleaded or shown at law. *Harris v. Harris*, 23 Gratt. 737. As just stated, failure of consideration may be shown under that statute as defense to a sealed instrument. *Fisher v. Burdett*, 21 W. Va. 626. We must, under that section, five, draw the line of distinction between want of consideration and failure of consideration, as they are different. The words "failure in the consideration," used in that section, refer to contracts where originally there was consideration subsequently failing, not to contracts wholly wanting consideration at their execution. *Crouch v. Davis*, 23 Gratt. 75; *Cunningham v. Smith*, 10 Gratt. 255; *Watkins v. Hopkins*, 13 Gratt. 743. But, as we hold that said section fifteen of chapter sixty six, found in chapter three, Acts 1893, does not enable a married woman to make a contract to bind her separate estate which she could not have made before it, and as our decisions stated above hold that a bond without consideration does not bind a married woman's estate, and she could show that want in a chancery suit to enforce it against her estate, and as we do not think that by giving action at law on such bond the legislature could have meant to deprive her of that defense, we conclude she may make defense of want of consideration at law, unlike other persons. But as above stated, there is valid consideration for this bond. So the plea presented no defense, and it was error to receive it, and render judgment in favor of the party filing it.

We therefore reverse the finding and judgment, and, rendering such judgment as the Circuit Court ought to have rendered, we disregard the plea as immaterial, and render judgment for plaintiff against both defendants. *Mason v. Bridge Co.*, 28 W. Va. 639.

SPRING-SPECIAL TERM, 1895.

CHARLESTON.

CLIFTON v. MONTAGUE.

Submitted January 12, 1895—Decided March 27, 1895.

1. LEASE—IMPLIED COVENANT.

Where a party in a written lease describes the property as "the premises known as the 'Bedford Salt Furnace Property,' together with all the appurtenances thereto belonging, including six salt wells, tools and fixtures of the same," there is no implied covenant on the part of the lessor that there are on said premises six salt wells of any particular productive capacity, or suitable for the purposes for which they are leased.

2. LEASE—RECITALS.

The recitals contained in said lease as to the number of salt wells included in the premises, after the lease has been accepted and acted on for more than two years by the lessee, with ample opportunity of knowing, not only the contents of the lease, but the character and quality of the property leased, must be regarded as conclusive of the fact between the parties to said lease.

3. LEASE—IMPLIED WARRANTY.

The words "including six salt wells," contained in said lease, create no implied warranty that there were six salt wells on said premises of any particular quality or fitness for manufacturing salt.

4. LEASE—COVENANT TO KEEP IN REPAIR—UNAVOIDABLE ACCIDENTS.

Where a written lease of property provides that the lessee shall keep the same in repair except as to unavoidable accidents and natural wear and tear, the law will not imply a contract on the part of the lessor to repair damages caused by unavoidable accidents.

MALCOLM JACKSON, TOMLINSON & WILEY and CHAS. E. HOGG for plaintiff in error, cited 1 Taylor Land & Ten. (8 Ed.) 295; 5 Cow. 570; 23 Ark. 9; 17 Mass. 411; 1 Green. Ev. (14 Ed.) 280; 26 W. Va. 460; 2 Wall. 728; 2 Rice Evidence

903; 20 Or. 108; 10 Lawyer's Reports Annotated. 785; 70 Tex. 30, 377; 9 S. E. Rep. 672; 2 C. C. A. 319; 100 Mass. 63; 5 Lans. (N. Y.) 230; 19 Wall. 548; 66 Mo. 63; 34 W. Va. 155, 764; 35 W. Va. 387, 389.

JOHN U. MYERS for defendant in error, cited among other cases, 24 W. Va. 206; 26 Am. Rep. 556; 33 W. Va. 32; 13 Gratt. 705; 6 Gratt. 633; 105 Mass. 478; 23 Mich. 164; 23 N. E. Rep. 1006; 9 Cush. 242; 135 Mass. 380; 145 Mass. 363; 118 N. Y. 110; 7 Am. St. Rep. 269; 77 Am. Dec. 229; 31 Barb. (N. Y.) 345; 44 N. J. L. 331; 23 Mich. 164; 82 Va. 612; Sto. Part. § 244; 2 Mass. 455; 15 Va. Law Journal 163; 17 Am. & Eng. Ency. of Law 505, 510, 511; 47 Me. 362; 24 Me. 534; 62 Ala. 299; 2 Dowl. 258; 10 Ala. 109; 1 Bart. L. Pr. 254, 464, 255, 315; 14 Gratt. 241; 22 Gratt. 136; 54 N. H. 426; 30 Pa. St. 293; 44 N. J. L. 332; 1 Sneed (Tenn.) 614; 7 Wall (U. S.) 416; 4 Mo. App. 591; 23 Mich. 164; 9 Cush. 242; 9 Cush. 89; 37 Barb. 313 or 331; 56 N. Y. (11 Sick.) 398; Am. Rep. 438; 48 Me. 316; 104 Ind. 81; 5 Rob. Pr. p. 78; 103 U. S. R. 485; 86 Va. 995; 76 Va. 169; 5 Gill 132 (46 Am. Dec. 628); 1 Chitty's Pl. (16 Ed.) p. 11 to 15 and notes 6th; 8 Serg. and Rawle 308; 4 Serg. and Rawle 549; 6 Mass. 460; 10 Mass. 379; 2 John Cos. 384; 1 Wash. Rep. 9 (15 Johns. 482); 16 Johns. 34; 18 Johns. 459; 8 Serg. and Rawle 53; 11 Johns. 141; 13 Pet. (U. 416; 4 Mo. App. 591; 23 Mich. 164; 9 Cush. 242; 9 Cush. 89; 71 N. Y. 481; 40 Barb. 574; 121 Ill. 61; 75 Wis. 462; 13 S. W. Rep. (Ky.) 108; 108 N. Y. 137; 34 Ga. 186; 2 Ill. 140; 38 Iowa 321; 85 Ky. 597; 52 Me. 597, 598; 6 Cush. (Mass.) 142; 9 Cush. (Mass.) 191; 29 Mich. 50; 5 Mich 368; 44 Mich. 617; 35 Miss. 25; 49 Mo. 559; 44 Mo. 444; 87 Pa. St. 365; 99 Pa. St. 555; (S. C. 44 Am. Rep. 126); 80 Va. 247; 23 How. (U. S.) 117; 117 U. S. 602; 90 N. Y. 213; 38 O. St. 659, 663; 45 O. S. 235, 236.

ENGLISH, JUDGE:

This was an action of covenant brought in the Circuit Court of Mason county by George Clifton against T. G. Montague. The action was predicated upon a lease executed by said T. G. Montague to said George Clifton and W. H. Cavan, dated August 23, 1890, whereby, in consideration of

the rents and covenants therein contained, the said T. G. Montague leased unto said Clifton and Cavan, for the period of three years from that date, the premises known as the "Bedford Salt Furnace Property," together with all the appurtenances thereto belonging, including six salt wells, tools and fixtures of the same, and the buildings of the party of the first part located thereon, situated in and near the village of Clifton, Mason county, W. Va., with the right to mine coal in the manner therein prescribed, to run said furnace, etc., upon the considerations and limitations therein set forth.

The plaintiff, in his declaration, averred that the defendant by said lease, for himself, impliedly and by operation of law, did covenant with the said George Clifton and W. H. Cavan that said premises and property included six salt wells as in the said deed specified, suitable for pumping brine therefrom and supplying the same to said furnace in the manufacture of salt on said premises, and that the defendant had not performed, fulfilled, and kept the covenants contained in said deed according to the tenor and effect, true intent, and meaning thereof, in this: That there were not six salt wells on said premises, as called for in said deed, suitable and proper for pumping brine therefrom and supplying brine to said furnace for the manufacture and sale of salt, but that there were only five salt wells on said premises suitable for pumping brine therefrom and supplying brine to said furnace in the manufacture and sale of salt.

On the 10th day of February, 1893, the defendant cravedoyer of the lease, and demurred to the plaintiff's declaration, which demurrer was overruled, and thereupon the defendant pleaded covenants performed and covenants not broken, and issue was thereon joined. On the 8th day of May, 1893, the plaintiff was allowed to amend his declaration at bar by inserting an additional count, in which count the breach was alleged as follows: "And plaintiff avers that, after said lease had been made and entered into as aforesaid, the said defendant, through his agent and employes, continued to work on said well in the act of putting it in proper order and repair for some time thereafter, but said defendant failed and

refused to finish the work of repairing said well; and by the negligence of his (defendant's) agents and employees, while said repairs were in progress, said well was rendered wholly worthless and made incapable of use by said lessees, Clifton and Cavan, and said well was practically destroyed, leaving in effect but five salt wells on said premises; and by reason of said negligence of the said defendant, through his agent and employees, in working on said well as aforesaid, said well was so much injured and impaired as not to be practically susceptible of being put in proper and suitable condition for use in connection with salt furnaces. And plaintiff avers that the defendant, in thus holding out to Clifton and Cavan before said lease was executed his purpose and intention of repairing said sixth well, whereby said lessees were induced to enter into said lease, after the execution to abandon as aforesaid the repairs of said well, and by defendant's own acts, as aforesaid, to render said well wholly worthless, was and is a gross fraud thereby practiced upon said lessees."

On the 16th day of May, 1893, the demurrer to the declaration as amended was sustained, and the plaintiff filed a second amended declaration by adding two new counts thereto, in the first of which counts the plaintiff averred that "the said defendant, since the making of said deed, hitherto had not performed, fulfilled, and kept the covenant in said deed contained on his part to be performed, fulfilled, and kept according to the tenor and effect, true intent, and meaning of said deed, in this, to wit: That there were not six salt wells on said premises, as called for in said deed, but that there were only five salt wells on said premises, and not six, as stipulated in said deed of lease.

"And plaintiff further averred that, in consequence of there being but five salt wells on said premises, the said George Clifton and W. H. Cavan were forced and compelled to provide another salt well at their own cost and expense, and at great delay and loss of time, and they were thereby greatly hindered and injured in the business of the manufacture and sale of salt on the said premises described and leased in and by said deed, of all of which the said defendant

afterwards, to wit, on the 1st day of December, 1892, and long prior thereto, had notice." In the second count the plaintiff avers, as a breach of covenant, "that the said defendant, since the making of the deed aforesaid, hitherto has not performed, fulfilled, and kept the covenants in said deed contained on his part to be performed, fulfilled and kept according to the tenor and effect, true intent, and meaning of said deed, in this, to wit: That the said defendant failed and neglected to deliver unto the said plaintiff and said W. H. Cavan the six salt wells in said deed of lease stipulated for, and only delivered unto them five salt wells, instead of the six wells called for in said lease, and that in consequence of the failure and neglect of the said defendant to deliver unto the said plaintiff and said W. H. Cavan the six salt wells stipulated for in said deed of lease, and by reason of his delivery of only five salt wells unto said plaintiff and said Cavan, the said George Clifton and W. H. Cavan were forced and compelled to provide another salt well at their own cost and expense, and at great delay and loss of time, and they were thereby greatly hindered and injured in the business of the manufacture and sale of salt on the said premises described in and by said deed, of all of which the said defendant afterwards had notice."

At the September term, 1893, the defendant cravedoyer of the writing obligatory sued on in this action, and demurred to the plaintiff's declaration as amended, and to each count thereof, in which the plaintiff joined, which demurrer was sustained by the court as to counts Nos. 1 and 2, and overruled as to counts Nos. 3 and 4, being the last two counts added, by way of amendment, to said declaration; and the defendant pleaded covenants performed and covenants not broken, and issue was joined thereon. The case was submitted to a jury, and after the plaintiff had introduced all of his witnesses, and examined them before the jury, and rested his case, the defendant, by his attorney, moved the court to exclude from the jury all the evidence introduced by the plaintiff, which motion was sustained by the court; and the plaintiff, by his counsel, excepted, and asked that the evidence so excluded be certified by the court and made part of

the record, which was accordingly done; and the jury found a verdict for the defendant, and thereupon the plaintiff moved the court to set aside the verdict and award him a new trial, because said verdict was contrary to the law and the evidence, which motion the court overruled. The plaintiff excepted. Judgment was rendered for the defendant, and this writ of error was obtained.

The first error assigned and relied upon by the plaintiff in error is as to the action of the Circuit Court in sustaining the demurrer to the plaintiff's declaration and first amended declaration. If, in considering the questions raised by this assignment of error, we turn to the rules prescribed by the elementary works in regard to the action of covenant as a remedy, we find in Chitty's Pleading (16th Ed. vol. 1, p. 129) the author says: "The rules respecting this action are few and simple. It is a remedy provided by law for the recovery of damages for the breach of a covenant or contract under seal. It can not be maintained except against a person who, by himself or some other person acting on his behalf, has executed a deed under seal, or who, under some very peculiar circumstances, which will be noticed hereafter, has agreed by deed to do a certain thing. In the case of a covenant under seal an action of covenant may be supported, whether such covenant be contained in a deed poll or indenture, or be express or implied by law from the terms of the deed." Upon this question as to the existence and extent of implied covenants, Mr. Justice Swayne, in delivering the opinion of the court in the case of *Sheets v. Selden*, 7 Wall. 423, says: "The tendency of modern decisions is not to imply covenants which might and ought to have been expressed if intended. A covenant is never implied that the lessor will make any repairs. The tenant can not make repairs at the expense of the landlord unless by special agreement. If a demised house be burned down by accident, the rent does not cease. The lessee continues liable, as if the accident had not occurred." In the case under consideration the lessees covenanted and agreed to pay to the lessor, his personal representative or assigns, two hundred and fifty dollars per month, at the end of each calendar month, for the use of the furnace and the bit-

tern flowing therefrom, and for the use of stable and ten dwelling houses upon said premises, and, in addition thereto, to pay a royalty for the coal to be mined by them in the quantity and manner therein prescribed. And it was further provided that, if said lessees failed or neglected to pay the party of the first part the rent and royalty for the space of five days after the same became due, without further demand, the said lessor might re-enter and take possession of said premises without legal process, and put an end to said tenancy, without waiving any security held by him for such rent and royalty. Said lessees also covenanted to keep said furnace plant in proper and sufficient repair, and, at the termination of the lease, to surrender and deliver possession of the premises and property therein described unto the said lessor, his heirs or assigns, in good working order and condition, unless destroyed by fire or other unavoidable casualty not caused by the negligence or carelessness of said lessees, their servants or agents. Now, over was craved of this lease when the demurrer was entered; and, in determining the questions raised by the demurrer, we must take the lease by the four corners, and gather from the entire instrument the true intent of the contracting parties. It appears therefrom that two hundred and fifty dollars per month was to be paid for the use of the furnace and the bittern flowing therefrom, and that the lessees expressly covenanted to keep the furnace plant in order and sufficient repair. Now, what is meant by the words "furnace plant"? Webster defines the word "plant," in a commercial point of view, as follows: "The whole machinery and apparatus employed in carrying on a trade or mechanical business, also sometimes including real estate and whatever represents investment of capital in the means of carrying on a business, but not including material worked upon or finished products; as the plant of a foundry, a mill, or a railroad." By the express terms and provisions of the lease, then, the lessees were to keep said furnace plant in proper and sufficient repair. The words "furnace plant," under the above definition we must regard as broad enough to cover the six salt wells, and especially is this the case when the lease on its face describes the proper-

ty leased as the "Bedford Salt Furnace Property," together with all the appurtenances thereto belonging, including six salt wells, tools and fixtures of the same, *etc.*; and, when we look further, it is apparent that the lessees covenanted and agreed to surrender and deliver possession of the premises and property thereinbefore described unto the party of the first part, his heirs or assigns, in good working order and condition, unless destroyed by fire or other unavoidable casualty not caused by the negligence or carelessness of said lessees, their servants or agents. Now, it is not to be presumed that said lessees would have covenanted to return the property described in the lease (which, in express words, includes six salt wells) if there were only five salt wells on the property, or that they would have entered into a covenant under seal for the lease of six salt wells when in reality there were only five on the property. Bigelow, in his valuable work on Estoppel, on page 611, says: "Generally speaking, it is often said that a man is presumed to know the truth in regard to facts within his own special means of knowledge. More definitely the rule has been stated thus: What a person is bound to know has regard to his particular means of knowledge, and to the nature of the representation, and is then subject to the test of the knowledge which a man, paying that attention which every man owes to his neighbor in making a representation, would have acquired in the particular case by the use of such means." In the case at bar, the lessor, in describing the property leased, speaks of it as the following premises and properties, to wit: "The premises known as the 'Bedford Salt Furnace Property,' together with all the appurtenances thereto belonging, including six salt wells," *etc.*, located thereon. The lessees, we must conclude, had the means of knowledge within their power as to the number of salt wells on this salt property. The number of salt wells on the property was not a matter of insignificance, but, on the contrary, the gravamen of the complaint in the plaintiff's declaration is that there were only five salt wells instead of six, as set forth and described in the lease. We must, then, regard the words "including six salt wells" as a particular

and definite recital of a material fact, and under the head of Estoppel (7 Am. & Eng. Enc. Law, p. 7) the law is stated thus: "Particular and definite recitals are conclusive evidence of the material facts stated;" meaning the material facts stated in a deed. And Bigelow on Estoppel, on page 345, says: "Between grantor and grantee the recitals of the deed will, doubtless, be conclusive evidence in a proper case." The recital contained in the deed of lease as to the number of salt wells on this property we must regard as conclusive of the fact; and the lessee, having accepted and acted upon said lease for more than two years, with ample opportunity of knowing not only the contents of the lease, but the character and quality of the property leased, is estopped from saying there were only five salt wells instead of six upon said salt property.

The plaintiff, then, having placed himself in a position which precludes him from denying that there were six salt wells on said property, the next question to which we direct our attention is as to whether the defendant, Montague, by his lease, covenanted that the said wells should yield any particular quantity of salt water, or have any particular productive capacity. So far as expressed covenants are concerned, the lease is silent as to the fitness of these wells for producing salt water. Is there any implied covenant, or covenant by operation of law, that said wells shall be fit for the purpose for which they were leased? If the wells were deficient, the lessees, by a provision contained in the lease, might have terminated their tenancy at the end of any month by failure to pay the rent for five days; but they saw proper to run the furnace for more than two years, and this would indicate that the property had some fitness for salt making. The weight of authority, however, as we understand it, is that there is no implied warranty as to the fitness of the leased premises for the purposes for which it is leased. So, in the case of *Harlan v. Navigation Co.*, 35 Pa. St. 287, it was held that "a lease of the right to mine coal in the land of the lessor is the grant of an interest in the land, and not a mere license to take the coal. In such a case there is no implied warranty that the land contains coal veins;" and that,

"if the parties to a coal lease were under a mutual mistake as to the existence of coal veins in the land demised, the proper remedy of the lessee is by a proceeding to rescind the contract; he can not have relief in an action in affirmance of it." In the case of *Sutton v. Temple*, 12 Mees. & W. 52, Park, B., held as follows: "With respect to the other and principal question in this case, *viz.*, whether a contract or condition is implied by law, on the demise of land, that it shall be reasonably fit for the purpose for which it is taken, if the question were *res integra*, I should entertain no doubt at all that no such contract or condition is implied in such a case. The word 'demise' certainly does not carry with it any such implied undertaking. The law merely annexes to it a condition that the party demising has a good title to the premises, and that the lessee shall not be evicted during the term. If we included any such contract as is now contended for, then in every farming lease, at a fixed rent, there would be an implied condition that the premises were fit for the purposes for which the tenant took them, and it is difficult to see where such a doctrine would stop." In the case of *Clark v. Babcock*, 23 Mich. 164, it was held that a lease of a salt well implies no covenant that the well shall be of any productive capacity. In the absence of any distinct agreement, the lessee takes it as he finds it. And in the case of *Kline v. McLain*, 33 W. Va. 32 (10 S. E. Rep. 11) this Court held that "a lessee of a store room can not recover in an action of *assumpsit* against his lessor for damages sustained by reason of the failure of said lessor to repair damages to such building caused by unavoidable accident, when there is a written lease between said contracting parties, in the absence of an express covenant that said lessor should make such repairs," and that "where a written lease of such building provides that the lessee shall keep the same in repair, except as to 'unavoidable accidents and natural wear and tear,' the law will not imply a contract on the part of the lessor to repair damages caused by unavoidable accidents, and a demurrer will be sustained to a declaration setting forth these facts in a special count," that "the lessee in such an action will be confined to the terms of the written con-

tract declared upon, and can not recover upon a verbal contract or understanding made or had contemporaneously with said written lease." Washburn on Real Property (volume 1, p. 537, § 7) states the law as follows: "Without an express contract on the part of the lessor, he can not be held liable for repairs made by the tenant upon demised premises. Nor would he be bound by a parol promise to make repairs if such promise is founded only upon the relation of landlord and tenant." Among the cases which might be cited upon this point, a canal company made a lease of water power which had been created by the construction of the canal. It was held not to constitute a covenant on the part of the lessors to keep the canal in repair or supply it with water; and, if the canal was discontinued, the lessee was without remedy. *Trustees v. Brett*, 25 Ind. 410. So, the lease of a water power out of a mill-pond then existing was not held to constitute an obligation on the part of the lessor to keep the dam in repair. *Morse v. Maddox*, 17 Mo. 569. And a grant for a right to take water from a well does not bind the owner of the well to repair it."

Reading then, the lease upon which this action was predicated, in the light of the authorities I have had an opportunity of examining, I can not construe the words "including six salt wells, tools and fixtures of the same," as implying six salt wells of any particular or peculiar fitness for the purpose of supplying salt water for the use of the furnace; neither can I hold that a salt well which is accidentally obstructed by the tubing is not a salt well; and, as we have seen, if the well is out of repair, in the absence of a special covenant the lessor is not bound to repair, but the lessee takes the property as he finds it.

Under our construction then, said lease contained no covenant, either impliedly or by operation of law, that said premises and property included six salt wells suitable for pumping brine therefrom and supplying the same to said furnace in the manufacture of salt on said premises. If it was true that there was a covenant implied that the six salt wells should be fit and suitable for pumping brine for said furnace, then it is true such implied covenant might be set forth in

the declaration; but, as there is no such implied covenant, the plaintiff must be confined in his pleading and proof to the covenants contained in the instrument sued upon; and the pleader in this instance having gone beyond the scope of the covenants contained in the lease, and being unauthorized to do so by any implied covenant, the Circuit Court, in my opinion, committed an error in sustaining the demurrer to said first declaration.

The plaintiff, in his amended declaration, avers that, "before said lease was executed, the defendant well knew that there were but five salt wells on said premises suitable to be used and pumped in the manufacture of salt; and defendant also knew that to render said Bedford Salt Furnace fit to well and properly make salt in the usual and ordinary way, the other and sixth well complained of therein would have to be repaired and made suitable as a salt well to be used in connection with said furnace; and that while the defendant, through his agents was proceeding to repair said well, the said lease was made; and that, after said lease was made, the defendant continued to work on said well in the act of putting it in proper order and repair for some time thereafter, but said defendant failed and refused to finish the repairs on said well, and by negligence of defendant's agents and employes, while said repairs were in progress, said well was rendered wholly worthless, leaving, in effect, but five salt wells on said premises; and that plaintiff was induced to enter into said lease by the defendant holding out to said Clifton and Cavan, before said lease was executed, his purpose and intention of repairing said sixth well, and afterwards to abandon said well, and by defendant's own acts to render said well wholly worthless, was a gross fraud upon said lessees," etc. Now, when it is remembered that this is an action of covenant, and the instrument sued on contains nothing implying an assurance that said well should be put in repair, and the law itself does not imply that the property leased shall have any particular suitability or fitness for the purpose for which it is leased, and when we consider, further, that the landlord is not bound to repair in the absence of a special covenant to that effect, we need but to refer to the

ruling of this Court in the case of *Kline v. McLain*, 33 W. Va. 32 (10 S. E. Rep. 11) where it is held that "the lessee in such an action, will be confined to the terms of the written contract declared upon, and can not recover upon a verbal contract or understanding made or had contemporaneously with said written lease;" and I can reach no other conclusion than that the demurrer was properly sustained to the amended declaration.

The plaintiff filed a second amended declaration, including two counts, which was also demurred to; but the court overruled the demurrer to said second amended declaration, as before stated. Did the court err in so ruling? These counts we regard also, as demurrable, for the reason that the lease, which (oyer having been craved) must be read in connection with the declaration, contains, as we construe it, no covenant, express or implied, that the property therein described contained six salt wells of any particular capacity, or that they were fit for the purpose for which they were leased. In the case of *Cowen v. Sunderland*, 145 Mass. 364 (14 N. E. Rep. 117) Devens, J., delivering the opinion of the court, says: "It is a general rule, well established by the decisions of this court, that the lessee takes an estate in the premises hired, and takes the risk of the quality of the premises in the absence of an express or implied warranty by the lessor or of deceit. * * * The rule of *careat emptor* applies, and it is for the lessee to make the examination necessary to determine whether the premises he hires are safe and adapted to the purposes for which they are hired." In the first of said counts it is complained that there were only five salt wells on said premises, and not six, as stipulated in said deed of lease; and, while it is true that the lease describes the premises as including six salt wells, yet, when we remember that *careat emptor* applies, and the plaintiff, under his hand and seal, has admitted that there were included in the premises six salt wells, he can not be heard to deny it. The second count avers that the defendant, by said deed, impliedly and by operation of law, did covenant with plaintiff and said Cavan to deliver unto them six salt wells on said premises for the purpose of the manufac-

ture of salt under said deed of lease, and the breach complained of is that only five salt wells were delivered to them instead of six, as called for in said lease. My construction of the lease, however, is that there was no implied covenant to deliver to said Clifton and Cavan any number of salt wells. The property leased to them is described in the lease as "the premises known as the 'Bedford Salt Furnace Property,' together with the appurtenances thereto belonging, including six salt wells," etc.; and, in speaking of the six salt wells, the evident intention was to describe the property included in the lease.

The deed itself would carry the right of possession. Ample time was given for examination. The deed bears date the 23d of August, 1890; and, according to the averments of the declaration, possession was not taken thereunder until the 28th day of October following. So that, if the rule *caveat emptor* is applied, the plaintiff can not complain, as he had ample time to examine the premises and ascertain what was included in the lease, and yet he took possession, and operated the property for more than two years thereafter; and, as to the implied covenant averred, it was held in *Hudson Canal Co. v. Pennsylvania Coal Co.*, 8 Wall. 276, that "in the case of a contract drawn technically in form, and with obvious attention to details, a covenant can not be implied, in the absence of language tending to a conclusion that the covenant sought to be set up was intended." Looking to the contents of this lease, it is apparent that the same is carefully and technically drawn, providing for the mining of coal, and furnishing the same to the furnace and engines, and allowing a deduction from the royalty in the event the furnace is stopped for more than five days without fault of the lessees, allowing the lessor to re-enter and re-occupy the premises upon the failure to pay rent and royalty for five days after the same falls due, providing that the property should not be sublet without the written consent of the lessor, and also that if the property should be seized by legal process for the debts of the lessees, the same should revert to the lessor; also containing a covenant that

the lessees should keep the furnace plant in proper and sufficient repair, and setting forth in detail how the coal banks, entries, railroad tracks, and drains shall be managed, and further providing for the return of the property described, including the six salt wells, at the termination of the lease to the lessor, his heirs or assigns, in good working order, unless destroyed by fire or unavoidable casualty, not caused by the negligence or carelessness of the lessees, their servants or agents. Can it be presumed that with more than two months' time to examine the property between the date of the lease and the time when the furnace was fired up, the plaintiff would accept and act under said lease, reciting, as it did, the vital and important fact that said premises included six salt wells, when in fact there were only five thereon? And the fact that under these circumstances, which appear on the face of the declaration, the lessees accepted the property under said lease, and actively operated the furnace thereon for more than two years, so far as appears, without any effort on their part to repair said sixth well, negatives the presumption that there was any implied covenant that there were six salt wells of any particular productive capacity on said premises. It appears by averment in the first amended declaration, that this sixth well was being repaired in some way by the the lessor at the time said lease was executed; but the fact that a salt well is out of repair does not prevent it from being a salt well still, any more than a coal bank which is obstructed at some point by fallen slate is no longer a coal bank; and, looking at the face of the lease, we can not say that the recital in the description of the property leased, including six salt wells, implied a covenant that there were six salt wells of any particular productive capacity on said premises, although the averments of the declaration show that there were six salt wells on said premises, one of which was being repaired at the time of the execution of the lease.

For these reasons, we think the plaintiff has shown no cause of action, and the demurrer should have been sustained to the entire declaration; and for the same reasons

we are of the opinion that the Circuit Court committed no error in excluding the plaintiff's evidence from the jury.

The judgment complained of must be affirmed, with costs, etc.

CHARLESTON.

ELDER *et al.* v. INCORPORATORS OF CENTRAL CITY.

Submitted January 15, 1895—Decided March 27, 1895.

INCORPORATION OF MUNICIPALITIES—CONSTITUTIONAL LAW.

Chapter 47 of the Code, in relation to the incorporation of cities, towns, and villages, in so far as it confers on the circuit court functions in their nature judicial and administrative, although in furtherance of the power of the legislative department of the state government, is constitutional and valid.

C. S. WELCH and SIMMS & ENSLOW for plaintiff in error, cited 29 Mich. 451; 32 Minn. 540; Cooley Con. Lim. p. 137; Locke on Civil Government 142; 43 Iowa 252; 28 W. Va. 289; 36 N. W. Rep. 813; 11 Ohio St. 99; 70 N. Y. 518; 14 Am. Rep. 312; 3 Am. & Eng. Cy. of Law, 698; 15 *Id.* 1003; Const. Art. VI, sec. 39.

GEO. J. MCCOMAS for defendants in error, cited Const. Art. VI, sec. 39; 32 Minn. 543; Cooley Con. Lim. 77; 10 Col. 553, 559; 13 Gratt. 78; 8 Pa. St. 391, 395, 416; 25 W. Va. 428; 11 Ohio St. 99; 8 Ohio St. 285; 28 W. Va. 289.

HOLT, PRESIDENT:

The Circuit Court of Cabell county, on petition of J. S. Farr and others, by order entered on the 31st day of July, 1893, directed a certificate of incorporation to be issued of a part of Guyandotte district as a town by the name of Central City, from which order B. D. Elder and others obtained this writ of error.

In 1872, the organization of many parts of the state into municipal corporations, for the purpose of local self-govern-

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ment had become a matter of frequent and urgent necessity. The framers of the constitution thought that this need in the great majority of cases could be met more efficiently and impartially by a general law than by a great multitude of special enactments; hence section thirty nine of article six of the constitution prescribes that the legislature shall not pass special laws incorporating cities, towns or villages, or amending the charter of any city, town or village, containing a population less than two thousand, but shall provide for the same by general law. Thereupon the legislature enacted chapter forty seven of the Code—see Code, p. 421 (Ed. 1891)—which provides that any part of any district or districts not included within any incorporated town, village, or city, and containing a resident population of not less than one hundred persons, and if it shall include within its boundaries a territory of not less than one quarter of one square mile in extent, may be incorporated as a city, town, or village, under the provisions of this chapter. It then provides that an accurate survey and map shall be made of the territory; that a census of the resident population shall be taken; public notice thereof be given that application will be made to the Circuit Court for a certificate of incorporation; and that the question will be, at a named time and place, submitted to the vote of the qualified resident voters; and upon filing a proper certificate, and upon satisfactory proof that a majority of all the qualified voters residing within such boundary have voted in favor of such incorporation, and that all the provisions of the law have been complied with, the Circuit Court shall by an order entered of record direct the clerk of said court to issue a certificate of incorporation of such city, town, or village in form or in substance as follows (giving the form). The statute then proceeds to prescribe the various powers and duties of such municipal corporation.

This statute itself erects the local body of citizens into a municipal corporation upon their bringing themselves within its provisions and upon complying with its terms, all of which are specific and fixed therein (see *Thomp. Corp.* § 110 *et seq.*); and whether the facts thus required exist in the par-

ticular case the Circuit Court, after due notice to all concerned and an opportunity to be heard against the application, ascertains and determines. This is, at least, an administrative or *quasi* judicial function, which the Circuit Court may be authorized to perform. See latter clause of section twelve, article eight, Const.

This Court has already held the statute in question to be constitutional (see *In re town of Union Mines*, 39 W. Va. 179 (19 S. E. Rep. 398); and, no other objection being made or discussed, the judgment complained of, ought to be affirmed, as a constitutional question is involved; but the majority of the court being of opinion that the matter is only administrative, and that this Court has no jurisdiction in a matter merely *quasi* judicial, the writ of error must be dismissed as improvidently awarded.

CHARLESTON.

FRAZIER v. KANAWHA & M. RY. CO.

Submitted January 31, 1895—Decided March 27, 1895.

CORPORATIONS—SERVICE OF PROCESS.

Process emanating from the Circuit Court against a corporation may be served upon any person appointed pursuant to law to accept service for it; but such service must be in the county in which such person resides, and the return must show this, and state on whom and when the service was, otherwise the service shall not be valid.

COUCH, FLOURNOY & PRICE for plaintiff in error:

Return of service bad.—Code, c. 41, s. 6; *Id.*, c. 124, s. 7; 31 W. Va. 364; 35 W. Va. 328; Code, c. 54, s. 24; *Id.*, c. 123, s. 1; *Id.*, c. 50, ss. 32, 39.

Demurrer to declaration.—Stephens on Plead. 69-70; Chitty on Plead. 465; 9 Gratt. 37.

No oath or bond.—Code, c. 85, s. 1 and 5; *Id.* c. 85, s. 10; *Id.* c. 118 s. 2 and 3.

Evidence as to heirs of Thomas Fife.—45 Ohio St. Rep. 470;

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42 536

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44 514
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4 Amer. St. Rep. 548; 57 Ga. 277; 29 Gratt. 255; 31 Gratt. 855; 26 W. Va. 143; 29 W. Va. 410.

Clark's Jurisdiction limited and special—Code, c. 118, ss. 1, 2, 3; 27 W. Va. 244, 256.

Appointment of Adm'r not reported to next regular session.—Code, c. 118, ss. 1, 2, 3; 34 W. Va. 400.

Measure of damages.—32 W. Va. 371, 377 *et seq.*; 152 U. S. 230; 113 Ind. 119; 48 Am. Dec. 637, note; 12 Am. St. Rep. 375, extended note; 17 Lawyers Reports Anno. 71, extended note; 31 W. Va. 316-317 and cases cited. Also p. 242 *et seq.*; 18 Q.B. 93; 3 Hurl. & N. 211; 29 Gratt. 570; 32 Gratt. 394; Death by Wrongful Act, Tiffany, see statutes and authorities there collected; 84 Cal. 515; 26 Ind. 477; 127 Ind. 545; 48 Fed. Rep. 663; 33 Conn. 51; 36 Conn. 152; 51 N. W. Rep. 244.

Must be natural and proximate cause.—31 W. Va. 231 and cases cited; 17 W. Va. 190.

Nominal damages only.—45 Ill. 197; 92 Amer. Dec. 206.

J. E. CHILTON and W. E. CHILTON for defendant in error, cited Code, c. 54, s. 37; 3 W. Va. 582; 20 W. Va. 571; 29 W. Va. 406; 12 Gratt. 89, 90, 91; 10 Gratt. 358, 377; 9 Leigh 119; 2 Rob. R. 102; 9 Gratt. 312, 328; 138 U. S. 439; 20 N. Y. S. 164; 21 S. W. Rep. 1088; *Id.* 1094; 22 S. W. Rep. 984; 50 N. W. Rep. 443; 89 Tenn. 575, 311; 18 S. W. Rep. 1139; 34 W. Va. 402; 8 Wheat. 642; 2 N. H. 437, 438; 1 Vermont 151; 10 W. Va. 507; Code, c. 125, s. 39; 10 W. Va. 507; 2 W. Va. 495; 21 W. Va. 218-19; 4 W. Va. 138, 634-35; 33 W. Va. 197; 37 W. Va. 606; 38 W. Va. 658.

SIMMS, ENSLOW & CHILTON for defendant in error:

As to appointment of administrator.—9 Gratt. 142; 12 Gratt. 85; 5 Johnson Ch'y N. Y. 334; 19 Gratt. 14; 4 Colorado 1; Sutherland on Statutory Constructions, 222.

As to instructions.—27 W. Va. 32; 32 W. Va. 370; 29 N. Y. 286.

ENGLISH, JUDGE:

On the 4th day of July, 1891, William E. Fife was traveling as a passenger on the Kanawha & Michigan Railway,

and was killed by a wreck occasioned by the falling of a bridge on the line of said railway in Kanawha county. On the 16th day of July, 1891, C. T. Fife was appointed administrator of his estate, and on the 21st day of June, 1893, the clerk of the County Court of Putnam county, in which county said W. E. Fife resided at the time of his death, made an order in vacation, reciting the facts as to the appointment of C. T. Fife as administrator of W. E. Fife, and his subsequent death, and upon the motion of J. L. Bowyer appointing J. E. Frazier, "sheriff of this county," administrator *de bonis non* of the personal estate of said W. E. Fife, deceased.

On the 1st day of July, 1893, an action of trespass on the case was brought in the Circuit Court of Kanawha county in the name of J. E. Frazier, sheriff, and administrator *de bonis non* of the estate of W. E. Fife, deceased, against the Kanawha & Michigan Railway Company, claiming ten thousand dollars damage on account of the death of his intestate. On the 12th day of December, 1893, when the case was called for trial, the defendant, by counsel, appeared for the purpose of moving to quash the plaintiff's writ and return thereon, which motion, having been made and considered by the court, was overruled, and the defendant excepted, and thereupon the defendant, by its attorneys, craved oyer of the plaintiff's letters testamentary, which were produced, and read to it, whereupon said defendant demurred to the plaintiff's declaration, and each count thereof, in which demurrer the plaintiff joined, which demurrer was overruled, and the defendant again excepted. The defendant then tendered six special pleas in writing, numbered from one to six, inclusive, to the filing of which, and each of them, the plaintiff objected, which objections were overruled, and said pleas were filed, and the plaintiff excepted; and the defendant also pleaded not guilty, and issue was thereon joined. The plaintiff replied generally to special pleas Nos. 1 and 4, and issue was thereon joined. Issue was also joined on special pleas Nos. 2 and 3, and the plaintiff replied generally to special plea No. 5, and issue was joined thereon and on plea No. 6. Said special pleas are in the words and figures following:

No. 1: "And for further plea in this behalf said defendant says that the plaintiff, J. E. Frazier, was not, at the time of the institution of this suit, nor ever hath been since said time, and is not now, the administrator *de bonis non* of W. E. Fife, deceased, and this it is ready to verify."

No. 2: "And for further plea in this behalf the said defendant says that the plaintiff, J. E. Frazier, was not at the time of the institution of this suit, nor ever hath been since said time, and is not now, the administrator *de bonis non* of W. E. Fife, deceased, and of this it puts itself upon the country."

No. 3: "And for further plea in this behalf the said defendant says that the plaintiff, J. E. Frazier, was not at the time of the institution of this suit the administrator *de bonis non* of W. E. Fife, deceased, and of this it puts itself upon the country."

No. 4: "And for further plea in this behalf the said defendant says that the plaintiff, J. E. Frazier, was not at the time of the institution of this suit the administrator *de bonis non* of W. E. Fife, deceased, and this it is ready to verify."

No. 5: "And for further plea in this behalf the defendant says that the plaintiff, J. E. Frazier, is not now the administrator *de bonis non* of W. E. Fife, deceased, and this the said defendant is ready to verify."

No. 6: "And for further plea in this behalf the defendant says that the said J. E. Frazier is not now the administrator *de bonis non* of W. E. Fife, deceased, and of this it puts itself upon the country."

On the 13th day of December, 1893, the case was submitted to a jury, which resulted in a verdict for the plaintiff, assessing the damages at four thousand, five hundred dollars. During the progress of the trial, and after all of the evidence was put before the jury, the court, at the instance of the plaintiff, gave to the jury the following instructions, marked one, two, three, and five:

No. 1: "The court instructs the jury that the law, in tenderness of human life, holds railroad companies liable for the slightest negligence, and compels them to repel by satisfactory proofs every imputation of such negligence. When

a railroad company undertakes to carry passengers by the agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. Any negligence or default in such cases makes such carrier liable in damages under the statute."

No. 2: "The jury are instructed that the defendant railway company is held by the law to the utmost care, not only in the management of its train and cars, but also in the structure, repair, and care of the track and bridges, and all other arrangements necessary to the safety of the passengers."

No. 3: "The jury are instructed that while they must assess the damages with reference to the pecuniary injuries sustained by the distributees in consequence of the death of W. E. Fife, they are not limited to the losses actually sustained at the precise period of his death, but may include all prospective losses, provided they are such as the jury believe from the evidence will actually and fairly and justly result to the distributees as the proximate damages arising from the wrongful death."

No. 5: "The court instructs the jury that in the record exhibited in this case the plaintiff, J. E. Frazier, is the administrator *de bonis non* of W. E. Fife, deceased, and as such can maintain this action."

The defendant moved the court in arrest of judgment, and to set aside the verdict of the jury rendered in the case, and award it a new trial, upon the ground that the said verdict was contrary to the law and the evidence, was excessive and exorbitant, and upon the further grounds that the court misinstructed the jury, and for other errors apparent upon the record, which motions were overruled, and the defendant excepted. The court rendered judgment upon said verdict, and the defendant applied for and obtained this writ of error.

The first error assigned and relied upon by the plaintiff in error is claimed to be in the action of the Circuit Court in overruling the defendant's motion to quash the return on the writ—that said return does not show that George S. Couch, the attorney upon whom it was served, resided in Kanawha

county when it was served. The return on said summons is as follows: "Executed the within summons the first day of July, 1893, by delivering an office copy thereof to George S. Couch, the attorney of record appointed by the Kanawha & Michigan Railway Company on whom process can be served, this day, in the county of Kanawha, state of West Virginia. Given under my hand this 1st day of July, 1893. J. G. Wilson, Deputy for Peter Silman, S. K. C." Did the Circuit Court err in overruling this motion? In determining this question we must look to the statute which prescribes the mode in which process shall be served upon a corporation. Section six of chapter forty one of the Code, among other things, provides that "the service of process when person or property is not to be taken into custody, or it is not otherwise specially provided, shall be subject to the regulations contained in the several sections from thirty two to thirty nine inclusive of chapter fifty of the Code." Section thirty four of chapter fifty provides that: "Unless otherwise specially provided such process or order and any notice against a corporation may be served upon the president, cashier, treasurer or chief officer thereof, or if there be no such officer, or if he be absent, on any officer, director, trustee or agent of the corporation at its principal office or place of business, or in any county in which a director or other officer or any agent of said corporation may reside. But service at any time may be made upon any corporation in the manner prescribed for similar proceedings in the circuit court." And section thirty eight provides that "service on any person under either of the last four sections shall be in the county in which he resides; and the return must show this, and state on whom and when the service was, otherwise the service shall not be valid." The ninth clause of section 17, chapter 14, p. 124, of the Code, under heading of "Statutes and Rules of Construction," provides that "the word 'person' includes corporations if not restricted by the context." It is true that section 7 of chapter 124, under the head of "Process Commencing Suit," etc., provides that "it shall be sufficient to serve any process against or notice to a corporation on its mayor, president or other chief

officer, or any person appointed pursuant to law to accept service of process for it," etc., but when we wish to ascertain how process is to be served upon these persons the information is obtained by turning to the statutes which have been quoted above, which prescribe the manner in which such process shall be executed and returned, which statutes, being in *pari materia*, are to be construed together. Now, the words with which section 38 of chapter 50 commence, to wit, "Service on any person under either of the last four sections shall be in the county in which he resides," includes "service upon any corporation in the manner prescribed for similar proceedings in the circuit court;" that is, as we find it provided in section 7 of chapter 124, "by serving the process *inter alia* on any person appointed pursuant to law to accept service of process for it," and such service being under one of the last four sections, as contemplated by section 38, of chapter 50, must be in the county in which the person resides upon whom it is executed, and the return must show this, and state on whom and when the service was, otherwise the service shall not be valid. In the case of *Railway Co. v. Ryan*, 31 W. Va. 366 (6 S. E. Rep. 924) Snyder, J., in delivering the opinion of the court, says: "And sections 34-37 of chapter 50 of the Code provide the manner in which service may be made on corporations for the commencement of actions in a justice's court. The next section is as follows: '38. Service on any person under either of the last four sections that is, sections 34-37 of chapter 50 of the Code, which includes service on the attorney appointed under chapter 54, as foresaid shall be in the county in which he resides, and the return must show this, and state on whom the service was, otherwise the service shall not be valid.' Comparing the returns with the provisions of this statute, it is apparent that the service on the corporation was invalid, because it fails to show that it was served on the attorney in the county of his residence. The statute expressly commands that the return shall state that the service was in the county in which the person served resides, and declares that, unless this is done, the service shall be invalid. The service being thus invalid, and there having been no appearance by the

corporation before the justice, the judgment, under such circumstances, is an absolute nullity. An invalid service is the same as no service whatever, and the law is well settled that a judgment rendered without an appearance by or service upon the defendant is void for want of jurisdiction in the court to pronounce judgment. Freem. Judgm. §§ 495, 521." Now, when we refer again to section six of chapter forty one under the head of "The Execution and Return of Process," we find that when person or property is not to be taken into custody, or it is not otherwise specially provided, such service shall be subject to the regulations contained in the several sections from thirty two to thirty nine, inclusive, of chapter fifty of the Code, which includes section thirty eight, which provides that service under said sections shall be in the county in which the person resides, and the return must show this, and state on whom and when the service was, otherwise the service shall not be valid. There can be no question but that this process should have been served subject to the regulations contained in the several sections from thirty two to thirty nine, inclusive, of chapter fifty, of the Code, because neither person nor property was to be taken into custody, and it is not otherwise specially provided. Section seven of chapter one hundred and twenty four provides on whom the process may be served, to wit, "any person appointed pursuant to law to accept service of process for it," but is silent as to the manner in which such service may be made; and when the officer executing the process wishes information as to the regulations respecting such service and his return thereon, he finds it alone in the last paragraph of section six of chapter forty one of the Code, and in sections from thirty two to thirty nine inclusive, in chapter fifty of the Code. The case of *Railway Co. v. Ryan, supra*, holds that a return of service of a summons issued by a justice against a corporation on the attorney appointed under chapter fifty four to accept service, etc., must show that such service was in the county in which he resides, to support its validity; and the last clause of section thirty four of chapter fifty of the Code provides that service may be made on any corporation in the

manner prescribed for similar proceedings in the circuit court, one of which modes is by service on such attorney; and when we inquire how it is to be served the answer is found in section thirty eight, which provides that such service shall be in the county in which such attorney resides, and the return must show this, and state on whom the service was, otherwise the service shall not be valid. Service on such attorney is to be made precisely as it is upon the president of such corporation, and this Court has held, in the case of *Taylor v. Railroad Co.*, 35 W. Va. 328 (13 S. E. Rep. 1009) that service of a summons in an action before a justice against a domestic railroad corporation upon its president must be in the county in which he resides, and the return must show that fact, else it is invalid, and that a judgment based on a return of service not showing that fact, there being no appearance, is void. In the case under consideration, there having been no appearance by the defendant previous to the motion to quash, and the service of the process being invalid, my conclusion is that the judgment complained of is void, being a judgment without service of process, and without jurisdiction of the person. See 1 Black, Judgm. § 229; Freem. Judgm. §§ 495, 521.

Having reached this conclusion, it might be unnecessary to allude to any of the other questions raised by the assignment of error, but, as a question is raised as to the validity of the appointment of J. E. Frazier, sheriff of Putnam county, administrator *de bonis non* of the personal estate of W. E. Fife, deceased, without discussing or passing upon the question raised as to whether a demurrer was the proper mode of suggesting that question, or whether a plea in abatement would have been the only way of bringing the question before the court, as the case must be remanded, I regard it proper to say that, where an administrator is properly appointed by the clerk of the county court, he need not wait until the confirmation of such appointment by the County Court before he proceeds to institute such suits as may be necessary in properly administering the estate of his intestate; otherwise one of the principal objects contemplated in allowing the clerk to appoint personal representatives

would be defeated. But while it is true the clerk of the county court may appoint personal representatives in vacation, such appointments, in order to be effectual, must conform to the requirements of the statute. Now, section ten of chapter eighty five of the Code, provides that: "If at any time three months elapse without there being an executor or administrator of the estate of the deceased (except during a contest about the decedent's will or during the infancy or absence of the executor) the court before whom the will was admitted to probate, or having jurisdiction to grant administration, shall on the motion of any person order the sheriff or other officer of the county to take into his possession the estate of such decedent and administer the same, whereupon the sheriff or other officer without taking any other oath of office or giving any other bond or security than he may have before taken or given shall be the administrator, *etc.*" The order made by the clerk of the County Court of Putnam county, on the 21st day of June, 1893, reads as follows: "It appearing that C. T. Fife, who was on the 16th day of July, 1891, by the clerk of this court, in vacation, appointed administrator of the personal estate of W. E. Fife, deceased, has since that time departed this life, now, therefore, I, R. A. Salmons, clerk of the County Court of Putnam county, upon the motion of J. T. Bowyer, do appoint J. E. Frazier, sheriff of this county, administrator *de bonis non* of the personal estate of the said W. E. Fife, deceased." Now, it does not appear on the face of the order that three months had elapsed without there being an administrator of the deceased; neither does the order direct said Frazier, as sheriff of the county, to take into his possession the estate of the deceased, and administer the same, and it seems from the language of the statute that such an order is required before such sheriff should be constituted the administrator. The order, therefore, appears to be defective in form and substance. But as I have reached the conclusion that the judgment complained of is void for want of jurisdiction, the process never having been served upon the defendant, it is useless to discuss the other questions presented by the record.

The judgment must be reversed, the verdict set aside, and the cause remanded, with costs to the plaintiff in error.

CHARLESTON.

HENRY v. OHIO RIVER R. Co.

Submitted January 31, 1895—Decided March 27, 1895.

1. PLEADING—ISSUE—VERIFICATION—REPLICATION.

There can not be an issue, where there is a plea of new matter, concluding with a verification, without a replication.

2. PLEADING—NEW MATTER—REPLICATION—JUDGMENT OF *Non Pros*.

Where there is a plea of new matter, concluding with a verification, and the plaintiff fails to reply to it, there ought to be a judgment of *non prosequitur* against him, after a rule to reply, but such rule need not be served.

3. PLEADING—JUDGMENT—NONSUIT

Such a judgment would not bar a second suit for same cause, it having the effect of a nonsuit.

4. PLEADING

Where there are two or more pleas, and one is good, though others be bad or found untrue, yet that plea defeats the action.

5. PLEADING—NEW MATTER—REPLICATION—WAIVER OF ERROR.

A plea introduces new matter, and concludes with a verification, and there is no replication to it or joinder in issue, but the case is tried on its merits upon the evidence, including the evidence touching the defense set up in such plea, and a verdict found responsive to such plea, and no exception made to it on that score in the Circuit Court. This Court will not reverse for this cause, especially at the instance of him who failed to file a replication.

6. OBSTRUCTION OF CULVERT—RECOVERY OF DAMAGES.

A railroad company makes an embankment in a street on which to lay its track, and so negligently constructs it as to obstruct or close a culvert already there for passage of water, and by reason thereof at times water from rain or snow collects and floods an adjoining lot. Its owner may recover damages.

7. OBSTRUCTION OF CULVERT—STATUTE OF LIMITATIONS.

The statute of limitations in such case begins to run, not from the date of the building of the embankment, but from the time of the actual injury from the invasion of the lot by the water; the injury being in law recurring, intermittent, and continuous.

8. PRIVATE NUISANCE—PERMANENT INJURY—RECURRING INJURY.

Permanent injury from private nuisance. When there must be

40	234
40	361

40	234
44	511

40	234
46	154

40	234
47	817
47	877
47	878
47	879

40	234
48	612

40	234
149	67

40	234
53	98

40	234
57	51

40	234
60	33

40	234
161	613

40	234
163	506

40	234
163	216
163	506

40	234
64	225

40	234
66	16

66	21
66	29

66	535
66	539

66	541
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recovery of past and future damages in one suit, and when repeated suits as injury recurs may be brought, discussed.

9. EVIDENCE—MOTION TO EXCLUDE EVIDENCE.

When the evidence tends in a fairly appreciable degree to sustain the plaintiff's action, the court must not strike out his evidence or direct a verdict for the defendant.

CHARLES E. HOGG for plaintiff in error, cited 16 W. Va. 282; 25 W. Va. 808; 23 W. Va. 457; 151 Mass. 46; 108 N. Y. 407; 105 N. Y. 246; 101 N. Y. 98; 63 Iowa 680; 63 Iowa 302; 71 Mo. 575; 70 Mo. 145; 22 N. J. L. 243; 22 Neb 343; 62 Tex. 593; 19 S. E. Rep. 401; 26 W. Va. 787; 37 W. Va. 108; 4 W. Va. 180; 23 W. Va. 14.

V. B. ARCHER for defendant in error, cited 23 W. Va. 451; 1 Am. R. R. & Corp. Rep. 708 note; 45 Iowa 652; 23 N. H. 83; 107 Mass. 352; 112 Mass. 334; 19 S. E. Rep. 404; 27 W. Va. 308-9; 50 Ill. 241; 3 Suth. on Dam. 403; 18 Minn. 265; 35 Ark. 622; 23 W. Va. 19; 4 Rand. 488; 20 Gratt. 344; 8 W. Va. 201; 9 W. Va. 634.

BRANNON, JUDGE:

Darius Henry brought trespass on the case in the Circuit Court of Mason county against the Ohio River Railroad Company, and by direction of the court the jury found for the defendant, and judgment was rendered for it, and the plaintiff appeals. The suit was for damages to a lot and residence thereon, injured by an overflow of water caused, as alleged, by an embankment raised by the company, on which it laid its track.

A question of law in the case is this: The defendant pleaded not guilty, putting itself on the country, and issue was regularly joined on that plea. The defendant also filed a plea of the statute of limitations, but the plaintiff made no replication to it, and the want of such replication introduces trouble in the case. When this plea came in, being one of confession and avoidance, it demanded a replication either by way of traverse or confession and avoidance; but, standing without replication, judgment should have been rendered upon it for the defendant, as it is a rule in the science of common-law pleading that a pleading introducing new

matter must be met by demurrer or by some response of fact. There was an objection to the plea, operating as a demurrer, which was overruled, and the plea received; but there was no replication, and, standing unanswered, it alone called for judgment for defendant. This judgment is based on the ground, under the system of pleading, that the plaintiff, by failing to reply to the plea, does not further prosecute his suit. A suit may not reach an issue. It may be cut short by failure of one of the parties to pursue his litigation. As to the defendant, if he appears, and fails to demur or plead to the declaration, or if, after plea, he fails to maintain the course of pleading required of him by the law of pleading, judgment called judgment by *nil dicit* (he says nothing) is given against him. This would be a judgment *quod reciperet*, both final in the cause and conclusive in a second suit. On the other hand judgment may be given against the plaintiff for not declaring, replying, surrejoining, or surrebutting, and this is called judgment by *non pros.* (*non prosequitur*—he does not prosecute). Steph. Pl. 108, 109; 4 Minor, Inst. 866; Tidd, Prac. 730. This judgment of *non pros.* is a species of nonsuit, and does not bar another suit. The matter of the unanswered plea is not taken for true; for, if it were, the judgment ought to be one of *nil capiat*, both final in the particular suit and a bar against another. It is based, not on the idea that the matter is true for all purposes, but only for failure to prosecute. It seems to be an unreasonable exception to that principle of the law of pleading which holds that whatever is well pleaded, and not denied, is taken to be true. 1 Saund. Pl. & Ev. 39. A much more logical principle would be to treat it as confessed, and render judgment final and conclusive, like the proceeding in chancery, where an answer is filed responsive to the bill alleging new matter, which, in absence of replication, is taken to be true, and final decree rendered upon it. *Cleggett v. Kittle*, 6 W. Va. 542.

At first thought, such judgment might be regarded as both final in the cause and conclusive upon the matter in controversy, as there is the declaration stating the cause of action, and the plea stating facts constituting a bar on its

merits, and it remains unanswered, and we might expect a judgment of the law, which would ever be an end of controversy upon those facts; but such a judgment is not regarded as one on the merits, but only as a nonsuit, and, while final in the particular case, not conclusive upon the matter of action. It is treated as a nonsuit by 3 Bl. Comm. 296; by 4 Minor, Inst. 867; 2 Black, Judgm. § 702; 1 Freem. Judgm. § 261. Judge Summers regarded it as a nonsuit in *Pinner v. Edwards*, 6 Rand. 675. All authorities hold that a nonsuit does not bar a second suit for the same cause. The authorities just given say that a judgment on *non pros.* will not defeat a second suit. The question was fully discussed in *Houes v. Austin*, 35 Ill. 396, in a case where, just as in this case, the pleas were general issue, and a special plea in bar, and, the plaintiff failing to reply to the special plea in answer to a rule to reply, judgment was entered that the defendant go hence, not that the plaintiff take nothing by his suit. It was held to be a judgment of nonsuit, and not a bar to second suit. It was not necessary, before rendering such judgment of *non pros.*, to wait for trial on the plea of not guilty; for there was the plea of the statute, and no replication, and it alone called for judgment ending the suit. If there be two or more pleas, one a good bar to the whole declaration, though others be bad, or found against the defendant, he is entitled to judgment on that plea. He may now plead several defenses, and, if one only be good, that is enough to defeat the action. 2 Tuck. Bl. Comm. 260; Steph. Pl. 273; *Clearwater v. Meredith*, 1 Wall. 25. If the plea were bad, such judgment would be improper; but this was the ordinary plea that the action accrued more than five years before suit, and was on its face good and properly admitted. But the trial went on, notwithstanding there was no replication to the plea of the statute, court and parties treating the case as though there had been an issue on it, probably by mere inadvertence. After the introduction of the plaintiff's evidence, the defendant, without giving any evidence, moved the court to direct the jury to find a verdict for the defendant on the plea and issue joined on the statute of limitations, and the court instructed the jury to find such verdict, and

it was found. The plaintiff in error says this verdict should be set aside, because there was no replication, and therefore no issue on the plea of the statute of limitations. I thought at first that we might be able to say that there was an issue by the language of an order which says that the defendant moved the court to direct the jury to find for it "on the plea and issue joined on the statute of limitations," and thus treat the case as it was acted upon in the Circuit Court—that is, upon issue properly joined; but I find no formal replication, or the informal one often resorted to, "And the plaintiff replies generally to said plea," which is simply entered in the order book, and, though informal, seems good (*Railroad Co. v. Bitner*, 15 W. Va. 459); and there is no reference to the joining of issue, save that incidental reference just quoted, and we can not, by mere implication from it, create what should be directly and affirmatively stated, the filing of a replication and joinder of issue on it. And, at best, that language recognizes only an issue, not a replication; and replication is one thing, joinder of issue another, and from the mere recital in the record of the existence of an issue, we can not imply that without which no issue could exist, that is, a rejoinder. "Where a plea concludes with a verification, there can not be a joinder of issue without a replication." *Lockridge v. Carlisle*, 6 Rand. 20; 1 Bart. Law Prac. 478, 480. In that case a statement on the record—stronger than in this case—that issue was joined on the special plea was held not to be sufficient. If the mere mention of an issue in the entry of said motion would be sufficient to show a replication, the statement in the record that the jury "was sworn to try the issue joined" would show the presence of a plea in such cases as *State v. Douglass*, 20 W. Va. 770, and *Ruffner v. Hill*, 21 W. Va. 152; but they hold otherwise. There is no statement in this record either of a replication or that issue was joined on the plea. Some cases hold that even where there is a statement that issue is joined, though there is none that the plea or other pleading was filed, there is still no issue and the defect is fatal. *Wilkinson v. Bennett*, 3 Munf. 314; *Stevens v. Thornton's Adm'r*, 1 Wash. (Va.) 194; *Lockridge v. Carlisle*, 6 Rand. 20. Others hold, not that

there is an issue in such case, but that it is merely misjoinder, and cured by statute of jeofails after verdict. *Moore v. Mauro*, 4 Rand. 488; *Huffman v. Alderson*, 9 W. Va. 616; *Railroad Co. v. Daniel*, 20 Gratt. 344. There is conflict in these cases. See 1 Bart. Law Prac. 482.

So, tested by technical principles of common-law pleading, we shall say there was no issue on this plea. What then? What the result? There is considerable difficulty in reaching this result. It has been long and often held by our courts that when a judgment rests on a verdict of a jury sworn to try an issue joined in a case, criminal or civil, when no issue had in fact been joined, it would be ground for its reversal. *State v. Douglass*, 20 W. Va. 770; *Ruffner v. Hill*, 21 W. Va. 152. So often and indiscriminately has it been held that the rule seems almost inexorable; but the courts have in some instances felt its inconvenience, in cases where there has been a fair trial on the merits, and no objection was made on that score in the trial court. In this case there was a plea of not guilty, and issue on it, and this plea of the statute, and all the evidence bearing on both, was heard, and a verdict responsive to issues under both pleas, had there been issues, was found; all parties treating the case as tried under both pleas. In *Huffman v. Alderson*, 9 W. Va. 616, it was held that, though some of the pleadings conclude with a verification, and no issues are formally joined thereon, though joined on others, yet if the record states that the jury was sworn to try the issues, and the instructions show that the case was fully tried on the merits, including the defenses set up by the pleadings, on which no issues were joined, and the verdict responds, not only to the issues joined, but to the defenses on which issues were not joined, such verdict cures such defects under the statute of jeofails, it being a case of misjoinder of issue. In *Griffe v. McCoy*, 8 W. Va. 201, Judge Haymond referred, with some expression of disapprobation, to the rigor of former decisions upon this subject, and thought they might need revision. He says he would follow the principles in *Southside R. Co. v. Daniel*, 20 Gratt. 344. That was an action for damage to land caused by overflow from an embankment made

for the railroad, as is this case, and, as in this case, the defendant pleaded not guilty, on which issue was joined, and a special plea, and there was a special replication, concluding to the country, but no rejoinder, nor any joinder of issue on it; but the parties went to trial, and the subject of the special plea and replication were contested before the jury, and there was a verdict for the plaintiff. The record, as here, showed that the jury was sworn to try the issue, not issues. It was held that, as there was no objection to the want of joinder in the court below, it could not avail in the appellate court. We know in the case in hand that the whole matter on this plea of the statute was contested, because the record states that the defense moved for a verdict "on the plea and issue joined on the statute of limitations," and the evidence covering that defense was before the jury. The case of *Moore v. Mauro*, 4 Rand. 438, supports this view. The case of *Curry v. Mannington*, 23 W. Va. 14, might seem at first view to forbid the application of this doctrine to this case. There the defendant pleaded not guilty and the statute of limitations, and there was no replication or joinder of issue on either plea, and the verdict for plaintiff was set aside at defendant's instance. There the defendant was not chargeable with the omission to reply to the pleas, and he could with consistency avail himself of the defect; whereas, in this case, it was the plaintiff's duty to reply to the plea, and he is the party asking to have the verdict set aside, and take advantage of his own default in pleading, as the defendant could not rejoin till the plaintiff replied. This is a reason, in addition to others stated above, for not allowing the plaintiff for this cause to set aside the verdict. So it seems to me that the plaintiff can not, under the circumstances set aside the verdict. It may be better for him that said that as there is no replication, he could not have considered that, as there is no replication, he could not have considered the evidence as regards the statute of limitation; but, as we hold to the same effect as if there had been such replication, we can consider the evidence as bearing on the issue raised by the plea of the statute.

Therefore I will now consider whether, under the evi-

dence, the action was barred, so as to see whether the action of the court in directing the jury to find for the defendant, on the theory that the action was barred, is correct or erroneous. The ground of action averred in the declaration is that the plaintiff was owner of a lot of land in the town of Clifton, on which was his dwelling, bounding a certain street, and the railroad company built its railroad across the street, and in so doing raised an embankment across the street on which its track was laid, and maintains it to the great detriment of the said property; that running along by the side of the street, and within its bounds, is a drain or culvert used to carry off water accumulating on the street from rain and snow; that the embankment was so carelessly, negligently, and unskillfully made that the water can not pass off the street, as it had always done before the embankment was made, but, by reason of such improper construction of the embankment, gathers on the street in great quantity, and flows into the plaintiff's lot, and into the cellar under his dwelling, and remains in the cellar for weeks and months, and deprives the plaintiff of the use of the cellar, and renders the dwelling damp and unhealthy, and damages the use of the property as a home, and renders the property less valuable than it would be without the embankment. Though general detriment to the plaintiff's property is alleged, the specification is the overflow of water from rains and snows, transient and recurrent causes. When does the statute of limitations begin to run in such case? Shall we count from the making of the embankment, or from each overflow as it recurs? Here the lines of thought and demarcation are close, the application of principles of law in particular instances difficult, and the authorities differing. The statute begins to run from the time the cause of action accrues. But when did that accrue in this case? The act of the defendant was the building of the embankment, but that, in itself, alone did not harm the plaintiff. He could not sue for that, as no harm as yet was done his property. Later on damage is done him by overflow. The water is the immediate agent doing the injury. We seek the cause of its presence, and find the em-

bankment is the cause of its presence. The overflow is consequential from the embankment. Never till this overflow did the plaintiff have right to sue. Had he sued at once on the making of the road, what would have been the basis of damage? The building of the embankment was the remote or primal cause—the *causa causans*—in the line or process of the production of the injury; but the overflow consequent upon it is the direct cause of harm—the gravamen of the action. If one put a log in the road, no individual can sue for that only; but if he fall over it he may sue, and the statute runs from the fall. There must be a wrong and some loss to warrant an action. The action accrues when the damage is sustained by the plaintiff, not when the causes are first set in motion ultimately producing the injury as a consequence. Wood, Nuis. § 865; Lewis, Em. Dom. § 666; Wood, Lim. § 180; 16 Am. & Eng. Enc. Law, 667; Ang. Lim. § 300. As stated in the elaborate and valuable notes to case of *Wells v. New Haven & Northampton Co.*, 151 Mass. 46 (23 N. E. Rep. 724 in 1 Am. Ry. & Corp. Rep. 708) the fundamental question is one of damages, and may be put thus: When, in a suit for damages resulting from a wrongful act, must there be a recovery in one suit for all damages past and prospective, and when must the recovery be limited to damages prior to the suit, leaving future damages for future suits, as future damages may occur? The question usually comes up in one of three forms: In considering the measure of damages, in considering whether the action is barred by limitation, and in considering whether it is barred by a former recovery. Now, when the case is one of such nature as to enable the party in one suit to recover future as well as past damages, there the statute runs from the original beginning of the nuisance; but, when there can only be recovery for past damages, the statute does not run from the institution of the nuisance, but from the injury, when it occurs or recurs as its consequence. Where the nuisance is permanent, so that it will continue unless labor be applied to change it, and it necessarily injures the plaintiff, there must be a recovery in one suit for all damage, and none other can be afterwards brought, and recovery of damages will give the defendant

right to continue his nuisance without further claim from the individual; but, where it is otherwise, there can not be recovery for future damages, but only from time to time as they occur, and one recovery does not justify the perpetuation of the nuisance, but there may be recovery after recovery, as long as continued. This doctrine is well settled and is recognized by this Court in *Hargreaves v. Kimberly*, 26 W. Va. 787; *Watts v. Railroad Co.*, 39 W. Va. 196 (19 S. E. Rep. 521); *Rogers v. Driving Co.*, 39 W. Va. 272 (19 S. E. Rep. 401); See Wood Nuis. § 865; Wood Lim. § 180. See exhaustive note to *Hargreaves v. Kimberly*, 53 Am. Rep. 123, being the opinion in *Uline v. Railroad Co.*, 101 N. Y. 98 (4 N. E. Rep. 536). In *Plate v. Railroad Co.*, 37 N. Y. 473, an action for maintaining railroad track and ditches, causing water to flow on land, just like this case, it was held that a former recovery was no bar to a second action, and that only past, not prospective damages could be recovered in such case. The New York cases collected in the opinion of *Uline v. Railroad Co.*, just mentioned, strongly support our view. In our case of *Hargreaves v. Kimberly* it is stated as a criterion whether one recovery would give a right to continue the cause. The trouble is to see what cases they are; in what cases a recovery for a trespass would confer a right, pass title to occupy land, or permanently injure it. Can land be thus acquired? I however, make no point on this, but the suggestion or doubt only strengthens the holding on the real point in this case. Can it be possible that an amount of damages could in this suit be recovered to cover all damages for all time to come from repeated overflows, when the company might, by small work, entirely remedy the evil? Could the jury or we act on any assumption that it would not do so, rather than suffer repeated actions? I think not. It seems settled that if a mill-dam cause an overflow upon land of a riparian owner, the cause of action is continuous, and he can sue as long as the overflow continues, until the right to overflow is vested and justified by prescription. *Staple v. Spring*, 10 Mass. 72; *Field v. Brown*, 24 Gratt. 74.

I would liken this case to the case of a mill-dam, save that, if any different, this is more plainly the case of continuous

injury, actionable upon each recurring overflow. I think the general rule as to nuisances applies to this case, it being one of recurring, intermittent, or occasional injury. That rule is that every continuance from day to day is a new nuisance, for which a fresh action lies, so that, though action for the original nuisance be barred, damages are recoverable for the statutory period for injuries within it, provided enough time has not elapsed to give the person maintaining the nuisance a right to do so by adversary use. 4 Minor. Inst. 509 (472) 546 (507); Wood, Nuis. § 865; Wood, Lim. § 180. Now, this embankment itself has the element of permanency, it is true, and that far complies with the rule warranting recovery of past and future damages, in one action, but it does not necessarily *per se* injure the plaintiff's property in respect to the mode of injury charged; that is, overflow. That happens only when rains or snows come. If the suit were for cutting off access by reason of the embankment only, it would be different. *Smith v. Railroad Co.*, 23 W. Va. 451. To warrant final recovery for past and future damage, there must be a structure permanent in nature, and damage directly and at once necessarily arising from it. In *Miller v. Railway Co.*, 63 Iowa, 680 (16 N. W. Rep. 567) it was held that against a cause of action for damages from water flowing through a ditch wrongfully dug, the statute runs, not from the date of digging the ditch, but from damage caused by it. In *Wells v. New Haven & Northampton Co.*, *supra*, it was held that where a railroad company collected the water of eight natural streams, and discharged it with considerable surface water upon land where much of it had not been accustomed to flow, that the nuisance was continuous, and action was not barred in six years from the erection, and one subsequently purchasing the land could sue for damages. So one purchasing after the improvement recovered in *Canal Co. v. Lee*, 22 N. J. Law, 243, which he could not do if the cause of action accrued from the date of the work. Here the cause of action is not from the work, as it would be if the action were for the mere construction of the embankment on plaintiff's land without authority, or for cutting off access to his lot. The construction of the work was lawful and au-

thorized, but it is the manner of construction, the negligent manner of construction, entailing injury later as a consequence by producing overflow, that is alleged as the wrong. The plea was properly received, but the evidence showed overflow within five years, and hence the plea could not justify judgment for defendant, as, although the embankment was more than five years old, the case was not such as would have warranted recovery of future damages had an action been brought within five years from the erection of the embankment, and, the damages being continuous, the statute ran, not from its erection, but from the overflow. So we hold that the court erred in directing the jury to find for the railroad company on the idea that the action was barred by time. That, though a work of improvement, like a railroad, is lawful and under authority, yet, if damage result to an individual by overflow of water by reason of negligent construction, he can recover, is well settled. *Gillison v. City of Charleston*, 16 W. Va. 282; *Knight v. Brown*, 25 W. Va. 808; *Taylor v. Railroad Co.*, 33 W. Va. 39 (10 S. E. Rep. 29). It is only an application of the maxim: "So use your own property or right that you do not injure another." I understand, indeed, that in this state, negligence is not an essential to recovery, but only damage. *Gillison v. City of Charleston*, 16 W. Va. 282; *Johnson v. Parkersburg, Id.* 402. But, where the landowner has been compensated, negligent construction is required to maintain action.

Another error is in the record; that is, under the plea of not guilty. I treat the action of the court in directing the jury to find a verdict for the defendant, in the light of a motion to exclude the plaintiff's evidence because insufficient to warrant a verdict for the plaintiff. In this view we need not, ought not, and do not pass on the weight or effect of the evidence to warrant a verdict for the plaintiff, but leave that for what that evidence has not as yet received—the consideration of the jury in another trial. All we have to say, under this plea of not guilty, is whether the evidence in any appreciable degree tends to support the action, and, if it does, that requires it to go before the jury for its verdict on it, and shows that the action of the court in directing a verdict was

erroneous. *Powell v. Love*, 36 W. Va. 96 (14 S. E. Rep. 405). See note Anth. Steph. Pl. p. 336. The court gave as a reason for its action its opinion that the action was barred by statute. Had such been the case, then one defense would have been enough, and there would be no error to reverse under the plea of not guilty in directing a verdict. It may be suggested that as the plea of the statute was not replied to, and as judgment should have been given on it for the defense before the trial, there is no error in giving judgment later, though after trial; that judgment is only what the defendant was entitled to on that plea, and that which ought earlier to have been given, has been given at last; that the record merely states a wrong reason for judgment, but if the judgment was properly given, on any ground, though not justified by the ground stated, the reason given, does not affect the judgment. *Shrewsbury v. Miller*, 10 W. Va. 115. But the answer is that the judgment rendered is upon verdict on both issues, and is one of *nil capiat*, forever barring the plaintiff from recovery in another suit for damage up to its institution, though it would not for after damages; whereas, the judgment called for by the failure to file a replication would be one of *non prosequitur*, as stated above, which would not preclude another action, for reasons fully given above.

For these reasons we reverse the judgment, set aside the verdict, and remand the cause, with direction to award a rule upon the plaintiff to file a replication to said special plea, and, if he do so, there shall be a new trial, and, if he does not, then for judgment of *non pros.* against the plaintiff. Reversed and remanded.

CHARLESTON.

MAYER v. FROBE *et al.*

Submitted September 11, 1894—Decided March 27, 1895.

1. DAMAGES—EXEMPLARY DAMAGES.

The common-law definition of the term "exemplary damages" is damages inflicted by way of punishment upon a wrongdoer as

40	246
40	603
40	246
41	130
40	246
43	488
40	246
44	648
45	55
45	56
40	246
45	54
46	365
46	554
40	246
52	232
40	246
	250

40	246
88	80
158	81
40	246
161	253
40	246
63	544
40	246
66	492
166	493
66	650
66	654

a warning to him and others to prevent a repetition or commission of similar wrongs.

2. DAMAGES—EXEMPLARY DAMAGES

The term "exemplary damages," in section twenty of chapter twenty nine, Acts of 1887, is used according to its common-law definition, and can not be otherwise construed without extrajudicial interference with a plain legislative enactment.

3. DAMAGES—EXEMPLARY DAMAGES.

The first and second point of the syllabus of *Pegram v. Stortz*, 31 W. Va. 220 (6 S. E. Rep. 485), and the first point of the syllabus of *Beck v. Thompson*, 31 W. Va. 459 (7 S. E. Rep. 447) in so far as they hold that exemplary damages, in a proper case, can not be inflicted by way of punishment in a civil suit upon a wrongdoer, are hereby disapproved and overruled.

4. DAMAGES—EXEMPLARY DAMAGES—TORTS.

In actions of tort, where gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear, or where legislative enactment authorizes it, the jury may assess exemplary, punitive, or vindictive damages; these terms being synonymous.

B. B. DOVENER for plaintiff in error.

W. W. ARNETT and ERSKINE & ALLISON for defendant in error, cited 31 W. Va. 220, 337; Acts 1877, c. 107, s. 16; Acts, 1887, c. 29, s. 20; 31 W. Va. 353; Acts, 1891, c. 100; 2 Am. & Eng. Enc. Law, 220; 26 W. Va. 280; 37 W. Va. 610; Acts 1887, c. 29, ss. 16, 20; 31 W. Va. 340, 341.

DENT, JUDGE:

Nancy C. Mayer plaintiff, on the 23d day of May, 1893, instituted her suit in the Circuit Court of Ohio county against George A. Frobe & Son to recover damages for the unlawful sales of intoxicating liquor to her husband, Carl Mayer, by which she was injured in her means of support, which resulted in a judgment for seven hundred and fifty dollars upon a verdict of a jury.

From this judgment the surviving defendant obtained a writ of error, and relies on the following assignment:

"*First.* The court erred in overruling defendant's demurrer to plaintiff's declaration.

"*Second.* The court erred in refusing to set aside the ver-

dict of the jury, and to grant a new trial. (See defendant's bill of exceptions No. 1).

"*Third.* The court erred in giving, at the request of the plaintiff, her instructions numbered, respectively 1 and 2, as set out in the defendant's bill of exceptions No. 2.

"*Fourth.* The court erred in refusing to give, at the request of the defendant, his instructions numbered 1 and 2, as set out in defendant's bill of exceptions No. 3.

"*Fifth.* The court erred in refusing to give, as requested, instructions to the jury, for defendant, numbered respectively, 3 and 4, and in giving modifications of same, as set out in defendant's bill of exceptions No. 4.

"*Sixth.* The court erred in allowing and permitting testimony, as well as refusing to permit certain testimony, to be given to, heard, and considered by the jury, as shown and set out in defendant's bills of exceptions numbered 1, 5, 6, 7, 8, and 9, respectively. And for other reasons apparent on the face of the record."

The first assignment appears to be waived in the argument, and, as there is no essential omission or defect of form in the declaration, the demurrer thereto was properly overruled. Nine bills of exceptions appear in the record, while the orders of the court only refer to and note the filing of one. It is a *stare decisis* rule of this Court that a bill of exceptions copied into the record, when there is no order filing the same, is not a true part of the record, and will not be considered. *Pegram v. Stortz*, 31 W. Va. 220 (6 S. E. Rep. 485) and authorities there cited. Hence eight of these bills of exceptions must be disregarded, while the first, and the only one which can be presumed to be a part of the record, is defective, in that the evidence is not incorporated in it. *Elliott*, App. Proc. §§ 821, 822. As to the eight extra bills of exceptions, it is sufficient to say that all the matters therein contained, or questions thereby raised, which are not purely technical and trivial, are included in a motion for a new trial; and in determining this the law must settle all or any of the questions raised as to any prejudicial ruling of the Circuit Court in so far as the defendant is concerned, and for this reason the failure to have his bills of exceptions properly made a part of the

record will not prevent a fair determination of the case, the defects in the bill filed being overlooked, that the important questions of law raised thereby may be judicially determined and settled. Among the defects pointed out and not here passed upon is the failure to designate specifically the grounds relied on in the motion for a new trial. *Gregory's Adm'r v. Railroad Co.*, 37 W. Va. 610 (16 S. E. Rep. 819); Elliott, App. Proc. §§ 827-895, inclusive.

Proceeding with the examination of the merits of this case, at the very threshold of its investigation, the question presents itself for determination whether this Court, as to the matter of exemplary damages will be controlled by the case of *Pegram v. Stortz*, 31 W. Va. 220 (6 S. E. Rep. 485) followed by *Beck v. Thompson*, 31 W. Va. 459 (7 S. E. Rep. 447) or will be governed by the law as settled beyond controversy by the great bulk of English and American authorities, including the supreme court of the United States. In the eighth edition of Sedgwick on Damages, revised and issued since the case of *Pegram v. Stortz*, the law is stated as follows, to wit: "In actions of tort, when gross fraud, malice, or oppression appears, the jury are not bound to adhere to the strict line of compensation, but may, by a severer verdict, at once impose a punishment on the defendant, and hold him up as an example to the community." 1 Sedg. Dam. (8th Ed.) § 347. "Considered as strictly punitive, the damages are for the punishment of the private tort, not for the public crime." *Id.* § 353. "Upon the whole the doctrine is to be supported (except in those few jurisdictions which have repudiated it) mainly on the grounds of authority and convenience." *Id.* § 354. The true doctrine on the subject, succinctly stated, and which should be generally received and strictly adhered to, is contained in the opinion of Justice Gray in the case of *Railway Co. v. Prentice*, decided Jan. 3, 1893, and reported in 147 U. S. 101 (13 Sup. Ct. 261): "In this Court the doctrine is well settled that in actions of tort the jury, in addition to the sum awarded by way of compensation for the plaintiff's injury, may award exemplary, punitive, or vindictive damages, sometimes called 'smart money,' if the defendant has acted wantonly or oppressively, or with such malice

as implies a spirit of mischief or criminal indifference to civil obligations. But such guilty intention on the part of the defendant is required in order to charge him with exemplary or punitive damages." *The Amiable Nancy*, 3 Wheat. 546, 558, 559; *Day v. Woodworth*, 13 How. 363, 371; *Railroad Co. v. Quigley*, 21 How. 202, 213, 214; *Railway Co. v. Ames*, 91 U. S. 489, 493, 495; *Railway Co. v. Humes*, 115 U. S. 512, 521 (6 Sup. Ct. 110); *Barry v. Edmunds*, 116 U. S. 550, 562, 563 (6 Sup. Ct. 501); *Railway v. Harris*, 122 U. S. 597, 609, 610 (7 Sup. Ct. 1286); *Railway Co. v. Beckwith*, 129 U. S. 26, 36 (9 Sup. Ct. 207). "Exemplary or punitive damages being awarded not by way of compensation to the sufferer, but by way of punishment of the offender and as a warning to others."

In the well considered case of *Pegram v. Stortz* the Supreme Court of this State, instead of following the hard-beaten path as clearly indicated by the decided weight of authority reaching beyond the memory of man into an unsearchable antiquity, and seeking to discover the underlying reason thereof, because the law appeared to their minds illogical, heroically assumed the responsibility, and endeavored to dam up the vast, increasing stream of judicial opinion, and turn it into a new and untried channel. But this attempt, however meritorious, has utterly failed of its purpose beyond our own borders, and within it has only served to produce perplexity and confusion, without any benefit, public or private, except to protect lawbreakers and wrongdoers from the just consequences of their illegal and wrongful acts.

Judge Green, in his lengthy opinion, concurred in by his associates, in line with the arguments of other dissenters from the established doctrine, relies on three principal objections to show that the doctrine of exemplary or punitive damages as received and acted on by the vast majority of judicial tribunals of last resort was opposed to reason, and therefore illogical and unjustifiable: *First*, That the form of the writ, excluding the very idea of punishment, does not justify or permit the recovery of any damages other than compensatory; *Second*, that to allow the assessment of punitive damages in a civil suit is unconstitutional, in that it per-

mits a defendant to be punished twice for the same offense; *Third*, that it is unjust to inflict a pecuniary punishment on a defendant, and donate it to the plaintiff instead of the state; there being no good reason, as he maintains, in allowing the plaintiff anything beyond a just compensation for injuries sustained, including mental anguish.

The first objection is technical, trivial, and wholly untenable; for the writ covers, and the plaintiff sues for all such damages as the law may award. Be they compensatory or punitive or both, they are his legal damages. Blackstone defines "damages" to be "a compensation and satisfaction for an injury sustained." 2 Bl. Comm. 438. A very ancient rule permitted a plaintiff to fix the amount of damages that would satisfy him for the wrong done. 1 Sedg. Dam. § 23. In almost all actions for a willful or wanton wrong to person, property or reputation it is more a question of satisfaction than of compensation that is sought; and satisfaction consist in visiting on the tortfeasor a punishment fully adequate to the personal injury inflicted by him, vindictive in its nature, and without regard to compensation. The man whose reputation has been vilified, whose child has been seduced from the paths of virtue by a scheming libertine, and his home and happiness wrecked, or who has endured public contumely, gross insult, or unprovoked abuse, appeals not to the law for compensation for his blighted reputation, his wrecked home, or his dishonored life, for that the law can never give, but he demands that the slanderer, the abuser, the vilifier, and the seducer shall be punished in proportion to his wanton, wicked or malicious conduct. In actions *ex contractu*, or mere thoughtless trespass, or of mistaken legal right, compensation is sought; but in actions of malicious wrong it is the satisfaction of punishment that is demanded. And the jurist, however able, who sees in a money compensation a balm for every wrong, however heinous, suffered, and who would limit the relief sought in such cases to the mere mercenary consideration of dollars and cents as a compensation, but adds to the injury already endured. The establishment of such a rule as law will drive many an honorable and sensi-

tive man out of the courts of justice, to become the vindicator of his own honor, and the avenger of his own wrong.

The second objection is equally untenable. There is no constitutional inhibition against a pecuniary punishment twice for the same offense, but the provision of the constitution is that "no person shall be put in jeopardy of life or liberty twice for the same offense." Judge Green, in construing this provision in the case of *Fountain v. Town of Moundsville*, 27 W. Va. 192, says: "Under our constitution it is clear that any one accused of a felony or misdemeanor or of a statutory crime which may be punished by imprisonment is entitled to the protection of this provision; and it is equally clear that no one accused of a statutory crime, the only punishment of which is a pecuniary fine, can claim the benefit of this provision; and therefore, as this crime is not punished by imprisonment, the same offense may, if the legislature authorize it, be punished by imprisonment as well as by fine, when committed in a municipal corporation." And the court proceeds to hold that the same overt act may be punished twice, once as an offense against municipal ordinance, and once as a statutory crime, so long as life and liberty are not twice put in jeopardy. The same reasoning is of equal force and just as applicable in punishment in a civil action for a private injury. In such case the wrongdoer is neither tried, convicted nor punished for a crime against the public. Sometimes the law may hold the wrongdoer's act to be a crime, and inflict on him a penalty or fine in addition to the civil punishment; but this is for the offense committed by him against the public, and not for the private injury inflicted. But oftentimes a punishment is imposed in a civil proceeding for an act which is not punished or punishable as a crime. It is, however, certainly true beyond dispute that the legislature is alone clothed with the power to determine in either case in what manner and to what extent the malefactor shall be punished, and at the same time to authorize both civil and criminal punishment where life and liberty are not involved. In the case of *Railway Co. v. Humes*, 115 U. S. 523 (6 Sup. Ct. 110) the Supreme Court of the United States, by Justice Field, says: "The power of the state to impose fines

and penalties for a violation of its statutory requirements is coeval with government; and the mode in which they shall be enforced—whether at the suit of a private party or at the suit of the public—and what disposition shall be made of the amounts collected, are merely matters of legislative discretion.” Admitting that the legislature has provided two ways of punishing an offender for the same offense, and in so doing it has exceeded its constitutional authority, yet, until the offender has been punished in one form, he can not plead it in bar of a proceeding in the other, for the object of the law is to punish the offender at least once, and not allow him to escape because he may be threatened with a double punishment. However this may be, it is plain that a wrongdoer may be punished in a civil action for the private injury inflicted by him, according to the willfulness of his act, to prevent a repetition of such wrongful acts on the part of himself and others; and such punishment is no bar to the infliction of a criminal punishment for the same act if it be a crime. Nor would this be a double punishment for the same offense, as in one case it would be punishment for an oppressive private wrong, and in the other for a wicked public crime. In the one case he is adjudged a criminal; in the other a wrongdoer. In the one case he is assessed with damages as a warning, and to prevent a repetition of wrongful conduct; in the other a penalty is imposed upon him for a crime committed.

The third and last objection is the most serious, but even it deserves not to be denounced as anomalous or illogical. The opponents of the doctrine of punitive damages, with a feeling of impregnability in the logic of their position, ask the question, why should the plaintiff, after having received a complete and adequate compensation for the injury received, be awarded a further sum as a mere punishment to the defendant? 1 Sedg. Dam. p. 517, answers this question as follows: “Many anomalies which have far less authority behind them must be supported on this ground, and no anomaly supported by both authority and convenience can be eradicated simply by showing it to be illogical. The idea that it is unjust rests upon the assumption that there is something unfair in allowing the plaintiff’s damages to be

enhanced on account of the defendant's intent; but it is to be said in reply to this that although the intent can not make a wrongful act more wrongful, it may make the consequences of it much more serious, and of the extent of these consequences the jury is the judge, and the only possible judge." The Supreme Court of the United States answers the same question as follows: "The plaintiff is entitled to exemplary damages, calculated to vindicate his right, and protect him against future invasions." *Barry v. Edmunds*, 116 U. S. 562 (6 Sup. Ct. 501). Also: "If, in such cases where injuries to property are committed, something beyond compensatory damages may be awarded to the owner by way of punishment for the company's negligence, the legislature may fix the amount, or prescribe the limit within which the jury may exercise their discretion. The additional damages being by way of punishment, it is clear that the amount may be thus fixed; and it is not a valid objection that the sufferer, instead of the state receives them. That is a matter on which the company has nothing to say." *Railway Co. v. Humes*, cited above. The law punishes the wrongdoer by a forfeiture of his property in the shape of damages measured by his evil intent. That it bestows these damages on the plaintiff is not a matter on which the defendant can complain, although it may enhance the bitterness of his punishment.

But there is still, in my humble opinion—in which the Court does not unite—a more valid, ancient, and sacred reason for the assessment of exemplary damages than those usually given, having for its object the suppression or prevention of all wrong, and the extermination of the desire or motive to commit wrong; and this is that the common-law is not agnostical, atheistical, nor even deistical, but is unswervingly theistical. As its crowning glory and chief excellence, with faith immovable it believes in the God of Moses, "who, watching over Israel, slumbers not, nor sleeps." Whatever atheistical or agnostical tendencies may have prevailed from time to time, no act repealing or abrogating, or even derogatory or repugnant to this fundamental principle of the common-law has ever been knowingly enacted

by the legislatures of this or the state of Virginia. The great English commentator on the common-law, known and honored by all jurists, speaking of the weakness of human reason corrupted by passion and prejudiced and impaired by disease and intemperance, says: "This has given manifold occasions for the benign interposition of Divine Providence, which, in compassion to the frailty, the imperfection, and the blindness of human reason, hath been pleased at sundry times and in divers manners to discover and enforce its laws by an immediate and direct revelation. The doctrines thus discovered we call the 'revealed' or 'divine' law, and they are to be found only in the Holy Scriptures. These precepts, when revealed, are found upon comparison to be really a part of the original law of nature, as they tend in all their consequences to man's felicity. But we are not from thence to conclude that the knowledge of these truths was attainable by reason in its present corrupted state, since we find that until they were revealed they were hid from the wisdom of ages. As, then, the moral precepts of this law are, indeed, of the same original with those of the law of nature, so their intrinsic obligation is of equal strength and perpetuity. Yet, undoubtedly, the revealed law is of infinitely more authenticity than that moral system, which is framed by ethical writers and denominated the 'natural' law, because one is the law of nature, expressly declared so to be by God himself; the other is only what by the assistance of human reason, we imagine to be that law. If we could be as certain of the latter as of the former, both would have an equal authority, but till then they can never be put in competition." 1 Bl. Comm. 42.

The faithful servant of God, whose equal, save One, has never appeared in human form, in transmitting from the infinite to the finite that perfect code of laws known as the "Ten Commandments," which challenges the admiration and obedience of all mankind as the sure foundation of peace, prosperity and happiness, also at the same time, as from the same divine source, delivered with a tongue that forbade the utterance of any untruth, the following, among other judgments for the government of his people: (1) "If

a man shall dig a pit, and not cover it, and an ox or an ass shall fall therein, the owner of the pit shall make it good."

(2) "For all manner of trespass, whether it be for ox, for ass, for sheep, for raiment, or for any manner of lost thing, which another challengeth to be his, the cause of both parties shall come before the judges, and whom the judges shall condemn, he shall pay double unto his neighbor."

(3.) "If a man shall steal an ox or a sheep, or kill it, or sell it, he shall restore five oxen for an ox and four sheep for a sheep." Exodus, c. 22. In these judgments the principle of punitive damages assessed in proportion to the evil intent of the wrongdoer is declared established, and enforced for the benefit of the injured party, and, in addition thereto, the offender had to make atonement for his sin or crime by suitable sacrifices.

It being my firm conviction, derived from the wisest expounders thereof, that the early founders of the common-law were true believers in the Bible as a revelation from God, and from which they acquired its most solid and enduring principles, I have referred to the foregoing judgments, without any intention of binding my associates to the same opinion. Nor do I consider it a mere arbitrary rule prescribed by supreme authority, but it is founded on wisdom and justice, for the purpose of preventing, rather than punishing, wrong. It is universally recognized as an unequivocal truth that the greatest source of evil among men is a selfish disregard of the rights of others, the existence of which argumentatively makes civil government absolutely necessary for man's felicity. To overcome and destroy this selfishness by rewards and punishments after the manner or measure of Biblical justice, when properly enforced, this rule has proven itself invaluable. Its effect is fourfold in its operation. As to the wrongdoer it is a double-edged sword: *First*. It requires him to make full reparation. *Second*. It punishes him in proportion to the maliciousness of his conduct. As to the sufferer. *First*. Acting as his protector, it fully compensates him for his loss. *Second*. As his avenger, it rewards him, in proportion to the wicked spirit of his adversary, for the obedient sub-

mission of his cause to its arbitrament. And, when strictly enforced, it stands as a continual and ever present menace to evil doers.

In law, as well as in physics, an ounce of prevention is worth a pound of cure. When an evil disposed person is forewarned that the effect of his wrongful act will in no wise injure the object of his malice, but will increase his neighbor's estate, and enhance his neighbor's prosperity, at an expense to and loss of his own, in proportion to his oppressive and unlawful conduct, he will not only hesitate, but be deterred from doing a wrong injurious to himself alone, and beneficial to the sufferer from his ill will or evil conduct. His motive for evil is thus destroyed.

The question may be suggested, where did the early Saxon founders of the common-law obtain their knowledge of this rule? Long before the most ancient records of Saxon origin, the tribes of Israel, by reason of their disobedience, in fulfillment of the farewell prophecies of their great law-giver, had been scattered "among all people, from the one end of the earth even unto the other," carrying with them the laws, precepts, and practices of their fathers, which they were commanded "to teach diligently unto their children." However this may be, truth is not a matter of locality. Wherever and whenever the human intellect, as the image of its maker, is uncorrupted by vice and immorality, uncontaminated by disease and intemperance, and unbiased by passion and prejudice, it perceives and seizes upon truth with an instinctive affection as a priceless possession bestowed by an all wise creator, and herein consists the "excellency of the common-law, which is said to be the perfection of human reason," and our system of trials by jury, having its foundation on the innate love of right and justice implanted in the breast of all men by infinite wisdom. An illustration of this is to be found in certain present provisions of our statutory law, which bear a marked resemblance to the ancient judgments cited above, and which it would be hardly safe to predicate on legislative imitation of the book of Exodus. Section 25, chapter 41, of the Code, provides that an officer who sells the exempt property of a

debtor shall forfeit and pay to him double the value thereof. Section 3, chapter 60, provides that for a simple trespass by any animal the owner shall pay compensatory damages; for a willful trespass, double; and, if allowed to continue, the trespassing animal is forfeited. Chapter 92 of the Code provides that where simple waste is committed, damages, as a compensation, shall be awarded; but, where the waste is willful or wanton, three times the damages sustained may be awarded. In these cases, and many others similar, punitive damages are awarded because of the willful, wanton, or unlawful conduct of the wrongdoer. In the case of *Railway v. Humes*, before cited, the court says: "The statutes of nearly every state in the Union provide for the increase of damages where the injury complained of results from the neglect of duties imposed for the better security of life and property; and make that increase in many cases double, in some cases treble, and even quadruple, the actual damages. And experience favors this legislation as the most efficient mode of preventing with the least inconvenience the commission of such injuries. The decisions of the highest courts have affirmed the validity of such legislation. The injury actually received is often so small that in many cases no effort would be made by the sufferer to obtain redress if the private interest were not supported by the imposition of punitive damages." There can, therefore, be no other conclusion than that exemplary, punitive, or vindictive damages are sustained by authority, Biblical and human, and justified by reason and experience as the most efficient means that can be devised under divine sanction to prevent the commission of private injuries, and most effectually and completely punish the wrongdoer for the willful and unlawful invasion of his neighbor's rights, and preserve with the least inconvenience and expense the peace and good order of society. The opposite doctrine, as maintained in the case of *Pegram v. Stortz*, directly contravenes this conclusion, and therefore does not propound the law. Hence the duty, unpleasant though it be, devolves upon us of disapproving and correcting the palpable error into which the court was then led, and of returning to the beaten path of the "wis-

dom of ages," from which there should be no future departure.

In the case of *Beck v. Thompson*, 31 W. Va. 459 (7 S. E. Rep. 447) the court followed the decision in the case of *Pegram v. Stortz*, and yet with no such disastrous consequences; for while it was held that exemplary damages could not be recovered as a punishment to the defendant, yet they were allowed as a compensation for the mental anguish, shame and dishonor suffered by the injured party. Sedgwick says (volume 1, § 354): "It should be observed, in conclusion, that even in jurisdictions which discountenance the doctrine (of punitive damages) juries are allowed to give, under the title of 'damages to feelings,' verdicts quite as substantial as any which could be recovered under the head of 'exemplary damages.' Hence it is not open to the opponents of exemplary damages to contend that the practical results of the application of the rule work any injustice, or that the rule bears more heavily upon the wrongdoer than the substitute of which they are advocates. In either case it is the jury, and not the court, which practically decides how much the plaintiff may recover." So in such cases it becomes simply a distinction without a difference. The jury, being unable to measure mental anguish, shame and dishonor in dollars and cents, ascertains and fixes the damages at a sufficient sum, measured by the maliciousness of the wrong, to adequately punish the wrongdoer; and the court, in sustaining the finding of the jury, determines that the sum so found is a compensation given for mental anguish. The law, by this nothing less than absurd position on the part of the administrators of justice, gains nothing, but loses much of the wholesome influence it would otherwise exert as a terror to evildoers and the avenger of its zealous and confiding supporters. In the case of *Borland v. Barrett*, 76 Va. 128—a case in all respects similar to *Beck v. Thompson*—the correct rule is given as follows: "The jury, in such case, may give not only such damages as they think necessary to compensate the plaintiff, but also such as will operate as a punishment to the defendant, and tend to deter him and others from similar outrages." The case

of *Beck v. Thompson*, therefore, while it did no harm. was decided under a misapprehension of the law, and, to the extent it follows a bad precedent, should be overruled. While apparently so at variance with each other, yet a reconciliation of these differences of opinion establishes the just rule of exemplary damages to be as follows: If, after the jury has assessed damages to fully compensate the plaintiff for the injury, such damages are still not sufficient in amount to punish the defendant for the maliciousness of the private wrong of which he is found guilty, and to hold him up as a public example and warning, to prevent the repetition of the same or the commission of similar wrongs, they may add such further sum, as may in their judgment, be necessary for this purpose. But if the damages assessed as compensatory are sufficient in amount to operate at the same time as a punishment and a warning, the jury are not authorized to add still a further and greater sum, and thus subject the defendant to a double punishment in the same case for the same wrong. A single punishment for a single private wrong is what the law seeks, and, if an adequate compensation will accomplish that purpose, the damages should end there. Justice is not an aristocrat, and should not be made to wear kid gloves on its iron hands to hide from a wrongdoer the fact that he is being punished until he smarts for his malicious, reckless, wanton or fraudulent conduct.

In the case so much relied on by Judge Green, of *Riddle v. McGinnis*, 22 W. Va. 253, being an action for seduction of a daughter, the Court held: "The jury, in estimating the damages sustained by the plaintiff, may take into consideration the mental anguish, the dishonor, and shame endured by the plaintiff * * * by reason of the wrongful act of the defendant." This necessarily must include punitive damages, as the lesser is always included in the greater; for what will satisfy shame, dishonor, and mental anguish can not be less in amount than such sum as will amply operate as a punishment to the defendant, and a warning to others. It would be a poor father, indeed, that would be content with a less satisfaction; and juries are usually composed of

fathers and brothers. But there are many cases in which the punitive damages must exceed the compensatory, and this oftentimes by legislative enactment. In the case of *Pegram v. Stortz*, while the argument is based on the claim that exemplary or punitive damages, strictly speaking, are in violation of constitutional and fundamental law, and although it must be conceded that the legislature used the word "exemplary" according to its ordinary, accepted and legal meaning, yet the court avoids the decision of the law as unconstitutional by giving a new definition to the word "exemplary," wholly different from the ordinary and commonly accepted definition as given in all the standard authorities, text-books and dictionaries, and received and acted on by the vast majority of courts and legislatures. Webb, Pol. Torts 220, notes. This redefinition is that "exemplary" means "indeterminate" damages, not given by way of punishment, and making an example of the malefactor for the wanton wrong committed by him, but to satisfy wounded honor or feelings, and therefore what law writers usually include under the head of "compensatory" as distinguished from "punitive" damages. In doing so the court not only violated the ordinary rule of construction "that, where a word has a clear and settled meaning at common-law, it should be given the same meaning in construing a statute, but unintentionally invaded legislative functions, and, in effect, amended the statute in such way as to defeat the evident intent and purpose of its enactment. There might have been some excuse for this unjustifiable departure from precedent if it was sound law, as maintained, that the legislature was deprived by some provision of the constitution of the power to authorize the recovery of strictly exemplary or punitive damages in case it might deem such recovery proper. But this legislative power is beyond question. *Railway Co. v. Humes*, cited above. While the only benefit that has accrued to any one from this redefinition of the word "exemplary" has been the protection of the willful and deliberate law breaker from well merited punishment, it has had the effect to produce confusion and contradiction in the decisions of this Court, and to bring them

into disrepute as reliable authority. In the case of *Ricketts v. Railway Co.*, 33 W. Va. 434 (10 S. E. Rep. 801) this Court is compelled to return to the true common-law definition of the word "exemplary" as recognized and expounded in *Downey v. Railroad Co.*, 28 W. Va. 732; *Ogg v. Murdock*, 25 W. Va. 139; *Vinal v. Core*, 18 W. Va. 1; *Baker v. Sweeney*, 13 W. Va. 158; and numerous other of its decisions, where the true meaning of the word was never questioned. It will hardly be maintained that "exemplary," when it relates to the unlawful sale of intoxicating liquors, has a different legal meaning from its usual meaning when applied to any other wrongful act. Such a proposition is too absurd for argument, and Judge Green, in his elaborate opinion, makes no such pretense. The doctrine of exemplary damages, as promulgated for the first time in the case of *Pegram v. Stortz*, followed by *Beck v. Thompson*, being subversive of the common-law, and in contravention of former decisions of this Court, can not be regarded as *stare decisis*, and should be no obstacle in the way of a return to well founded principles supported by reason and justice, and upheld by authority and practice, to which the "memory of man runneth not to the contrary." Not only is this true as a privilege, but is incumbent as a duty, when by so doing the decisions of the court will be rescued from contradiction, obscurity and doubt, the legislative enactment sustained and vindicated in accordance with its true intent and meaning, and ends of justice attained and promoted. For this Court to take any other than a backward step in this matter to regain a correct position would be to plunge into further difficulties among a hopeless minority, blindly groping about in a mist of its own creation, avoiding the beacon lights of the past, and straying farther away from the point of its departure; thus rendering a return to the old landmarks impossible, except through legislative intervention declarative of the common-law. The creation of such a necessity should be avoided when possible.

Besides the courts of England and the Supreme Court of the United States, nearly every state supreme court has held the doctrine of exemplary damages strictly as a pun-

ishment to be the true common-law rule. 1 Sedg. Dam. § 360. In construing an enactment of the legislature it is always necessary to consider the cause for its existence, or the evil to be remedied. Many good people believe that the sale of intoxicating liquors is an evil in itself that should be prohibited; others consider it a necessary evil that should be regulated and licensed; while still another class regard it a legitimate branch of business, subject to abuse, and necessary to be surrounded with safeguards. All classes, except the lawless, agree that the sale of intoxicating liquors to a minor or an habitual drunkard is an evil in itself, and oftentimes productive of great harm to innocent and dependent persons in their property, persons and means of support, and therefore should be absolutely prohibited. A compromise of these various views originated in the present license and local option law, with its penalties and forfeitures, contained in chapter 29, Acts 1887, being the enactment under which this suit was instituted. Section 16 of the act provides: "If any person, having a state license to sell spirituous liquors, wine, porter, ale, beer, or any other intoxicating drink, shall sell or give any such liquors or drinks to any minor or person of unsound mind or to any person who is intoxicated at the time or who is in the habit of drinking to intoxication, or if he permit any person to drink to intoxication when he knows or has reason to believe such person is a minor or of unsound mind, or is intoxicated, or is in the habit of drinking to intoxication, on any premises under his control, or sell or give any intoxicating drink to any one on Sunday, he shall be guilty of a misdemeanor and fined not less than twenty nor more than one hundred dollars." And section 20 provides: "Every husband, wife, child, parent, guardian, employer or other person who shall be injured in person or property, or means of support by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her name severally or jointly against any person who shall by unlawfully selling or giving intoxicating liquors have caused the intoxication in whole or in part of such person, and any person or persons owning,

renting, leasing or permitting the occupation of any building or premises and having knowledge that intoxicating liquors are to be sold therein, or having leased the same for other purposes shall knowingly permit therein the sale of any intoxicating liquors that have caused in whole or in part the intoxication of any person shall be liable severally and jointly with the person or persons selling or giving intoxicating liquors aforesaid for all damages sustained and for exemplary damages." By these sections the condition of dependence of one person on another is fully recognized, and a private right declared, the infringement of which becomes a private wrong, for which an action lies not only for compensatory, but exemplary, damages. This statute differs from the one under which the case of *Pegram v. Stortz* was decided, in that no notice of the lawbreaker is required before a civil suit can be instituted; hence much of the reasoning in that case has no bearing on this. The main question in both cases, however, is as to the legislative intention in the use of the word "exemplary." In that case Judge Green says: "The evident object of our statute was to recompense members of a family for certain losses sustained by the sale or furnishing of intoxicating liquors to a member of the family in violation of certain specified provisions of the statute, and it was not intended to punish the vendor of such intoxicating liquors." This is on the theory that the legislature understood before the enactment of the law what definition would be given by him to the word "exemplary," a matter of impossibility. But it is quite plain that the legislature had in contemplation the very ordinary and commonly accepted meaning of the word "exemplary," and it was their evident intention to provide both civil and criminal punishment for the willful lawbreaker, as the most effectual means to prevent the evils of intoxication or excessive drinking. *Bean v. Green*, 33 Ohio St. 451; *Rawlins v. Vidvard*, 34 Hun. 209. The wrong from which the injury results being criminally unlawful, is wanton, and therefore a proper case for the imposition of exemplary damages. The tendency of the earlier decisions in some states, when the legislation on the subject was new and untried, was to hold that aggra-

vating circumstances, in addition to the proof that the sale was unlawful and injurious, were necessary to be shown to justify the assessment of exemplary damages according to the common-law rule. *Franklin v. Schermerhorn*, 8 Hun. 115. But the later and better considered decisions are to the effect that where the sale is shown to be injurious to the plaintiff in person, property or means of support, the fact that it was knowingly made in direct violation of the statute, without any other aggravating circumstances, furnishes sufficient grounds for the imposition of exemplary damages. *Schneider v. Hosier*, 21 Ohio St. 98; *Bean v. Green*, 33 Ohio St. 444; *Davis v. Standish*, 26 Hun. 615; *Rawlins v. Vidvard*, 34 Hun. 209; *Weitz v. Ercen*, 50 Iowa 34; *Jockers v. Borgman*, 29 Kan. 110. Our legislature has so declared, and in so doing, not having exceeded its constitutional bounds, its enactment is beyond the pale of judicial interference. If the law is unwise or injudicious or operates too harshly or severely, the responsibility must rest with, and an appeal for relief must be to, the legislature, and not to the judiciary, who are powerless to alleviate the severity of any constitutional enactment.

In considering the motion for a new trial it is the well settled rule that the weight of the testimony is for the jury, and not for the court; and, unless the verdict is plainly contrary to the weight of the testimony, it will not be disturbed.

Thus viewing this case, the unlawful sales of intoxicating liquors injurious to the plaintiff's means of support are fully established. The husband had become an habitual drunkard, squandered all his property, and deserted his family, because of his intemperate habits, leaving the wife to support herself and children. The surviving defendant insists as a sole objection to the sufficiency of the evidence that no knowledge of the drinking habits of the husband was brought home to the defendants. There might have been some grounds for this objection had he not testified himself with regard thereto, and given as his reason for not selling the husband anything to drink that he knew his wife did not want him to have any, and knew the way he got when he was next door. Evidently the jury believed his admissions, and

gave him full credit therefor, but disbelieved and disregarded his testimony denying the sales, concerning which he was contradicted by other witnesses in the case. There are various other circumstances shown in the evidence from which the jury could infer he had full knowledge of the drunken habits of the husband. Their verdict, being supported by evidence, can not be disturbed, although the court might have disagreed with their finding had they been on the jury.

As to what would be a proper amount to assess by way of punishment for the private wrong done to operate as a warning and prevent repetition of similar wrongs, many minds might well differ, and, the legislature not having seen proper to fix any limit, the jury become the sole and final judges, unless their finding evinces passion, prejudice, partiality or corruption; and the court can not invade their province. Under the law as applied to the circumstances of this case, seven hundred and fifty dollars is not an excessive verdict. *Battrell v. Railway Co.*, 34 W. Va. 232 (12 S. E. Rep. 699); *Borland v. Barrett*, 76 Va. 128.

The defendant might well insist that the punishment is severe; that if he had not made the sales complained of, others would have done so; and that the sale of intoxicants being a legitimate business, there were divers ways in which a person in the habit of drinking to intoxication could and would obtain the means to satisfy an uncontrollable thirst; and that he should not be made the scapegoat or sacrifice for the sins of others. The answer suggests itself that although the law licenses drinking as a source of revenue, it seeks to prevent and suppress intemperance, with its long line of attendant evils; and the legislature, with this end in view, has authorized the infliction of exemplary damages. That the spirit and manifest intention of the law is good, can not be denied; and if it could be made to effect the object of its originators it would confer upon society a boon of inestimable value; and, even though it should only succeed in diminishing to a limited extent the widespread sorrow, poverty and misery inflicted on the helpless and innocent by the wretched slaves of a depraved and vicious appetite, its enactment will not have been in vain. That it may prove

entirely abortive is not a valid reason why the court should refuse to enforce or the defendant decline to obey it, although it might furnish a potent reason why the legislature should amend or repeal it.

There being no sufficient error to justify the reversal of the judgment of the Circuit Court, it is affirmed.

BRANNON, JUDGE:

Judges Holt, English and myself, lest we be misunderstood, conclude that a short note, to express our position, is called for in view of the opinion in this case. In consultation we suggested that we did not feel called upon, in a judicial opinion, to assert or deny any particular, distinctive Christian creed or dogma. Blackstone is referred to in the above opinion. He was writing law for a government in which church and state were united, a particular church and its creed being an integral part of that government; but it is our boast that ours is a government in which church and state are separated by the letter of our constitutions, by governmental administration, and by the sentiment of our people. In this land every one may worship and believe as his conscience and mind approve. Our government knows no distinctive Christian or other creed, merely as such, but grants absolute tolerance to all creeds and beliefs; and our population is composed of people of many different Christian denominations and of other creeds. As men and citizens they are equal before the law, the government and the public courts. The government is by all, for all, and of all the people. This Court is a part of that government. Its duty is to expound alike for all the municipal law of the land, and when it does that its function is performed. It is not its duty or prerogative to expound religious principles, or expressly or impliedly disparage any man's belief. While we, as individuals, have the highest regard and respect for Christianity generally, we do not think it proper, in an opinion of this Court, to appear to espouse or enforce any particular or distinctive Christian creed.

CHARLESTON.

STATE v. WILLIAMS.

Submitted January 29, 1895—Decided March 27, 1895.

1. CRIMINAL LAW—REASONABLE DOUBT.

The twelfth point of the syllabus in the case of *State v. Robinson*, 20 W. Va. 714, is approved.

2. CRIMINAL LAW—CAPACITY OF DEFENDANT.

Capacity to commit crime is a question to be determined by the jury from the age, appearance and conduct of the accused, both at the time of the commission of the offense and at the time of the trial.

3. CRIMINAL LAW—BURGLARY—DWELLING HOUSE

The criminal law of this state includes all buildings, as either a dwelling house, or outhouse adjoining thereto or occupied therewith, or as an office, shop, warehouse, banking house, or building other than a dwelling house. The use of the building at the time of the offense determines its character.

4. CRIMINAL LAW—BURGLARY—LARCENY

The third and fourth points of the syllabus in the case of the *State v. McClung*, 35 W. Va. 280, are approved.

ALEX. DULIN for plaintiff in error, cited 2 Am. & Eng. Ency. Law, 672; 36 W. Va. 729; 4 Am. & Eng. Ency. Law, 683, 684; Dest. Cr. L. § 22a; 1 Bish. Cr. L. (7th Ed.) §§ 370, 371; 3 Gr. Ev. (15th Ed.) § 4; 13 Gratt. 763; 2 Am. & Eng. Ency. Law, 671-73; 2 East's P. C. 496-99; 62 Miss. 781; Bish. Stat. Cr. §§ 277-79; Am. Dig. (1893) 355; 93 Mich. 46; 27 W. Va. 375; 2 Am. & Eng. Ency. Law, 697.

ATTORNEY GENERAL T. S. RILEY for the state, cited 20 W. Va. 713, 743; 27 W. Va. 375.

DENT, JUDGE:

At the September term, 1894, of the Circuit Court of Braxton county, Abner Williams, a boy thirteen years of age, was found guilty of a felony, and sentenced to the reform school of this state.

He obtained a writ of error of this Court, and relies on the following assignment, to wit: "*First*, it was error to give the five instructions, and each of them, asked by the state, and given by the court to the jury, as set out in bill of exceptions No. 1. *Second*, it was error to overrule the motion of petitioner to set aside the verdict and grant him a new trial on the grounds stated in the record, as shown by bill of exceptions No. 2, and render the judgment complained of herein."

The instructions objected to are as follows, to wit: No. 1. "If the jury believe from the evidence that the house mentioned in the indictment was in the actual or constructive possession of John B. Morrison, then the ownership is properly laid in the said Morrison, although they believe from the evidence that the title to said property was at the time in W. F. Morrison, John Bryne and D. A. Berry's heirs." No. 2. "If the jury believe from the evidence that John B. Morrison held the possession of said house at the time alleged in the indictment, and that he used and occupied said house as a dwelling, then, in contemplation of law, said house was the dwelling house of John B. Morrison, although he may have absented himself therefrom for several months, and although he may have had another dwelling house during the same time." No. 3. "The jury is instructed that although they should believe that no dwelling house was broken or entered, as alleged in the indictment, yet if they believe from the evidence that the defendant stole and carried away any of the goods of John B. Morrison, as alleged in the indictment, then they should find him guilty of the larceny of said goods." No. 4. "To establish capacity to commit crime in a person over seven and under fourteen years, it is not necessary that any witness shall state that he has such capacity, but the same may be shown to exist by the appearance and general conduct of the accused, and by his testimony as a witness before the jury." No. 5. "A person is amenable to punishment for crime if he be of sufficient understanding to be able to distinguish right from wrong."

The first, second and third instructions are objected to for failure to use the words "beyond a reasonable doubt,"

although the court had instructed the jury, at the instance of the prisoner, that they must believe him guilty beyond a reasonable doubt, or acquit him. This objection is completely answered by the twelfth point of the syllabus in the case of *State v. Robinson*, 20 W. Va. 714. The objection to the second instruction is that it fails to inform the jury that they must believe from the evidence that John B. Morrison left the house with the intention of returning to make it his dwelling house. The instruction does inform the jury that they must believe from the evidence that John B. Morrison used and occupied said house as a dwelling. This is certainly a sufficient answer to the objection raised. The objection to the fourth instruction is equally untenable, as the jury, in passing on the capacity of the accused to commit crime, have the right to take into consideration his appearance and conduct at the time of the trial, as well as at the time the offense was committed. The fifth instruction is very general in its terms, but the jury could not possibly be misled thereby, especially in the light of the various instructions given for the accused.

The principal reason alleged to support the second assignment of error is that the evidence fails to establish the house in question to be a dwelling house at the time of the offense. Sections 11, 12, chapter 145, of the Code, include all buildings, as either a dwelling house, or "office, shop, store-house, banking-house, or any house or building other than a dwelling house or out house adjoining thereto or occupied therewith." The house in question was built and used for a dwelling house, and would ordinarily be designated as such to distinguish it from a building of a different kind. Up until the time of the offense charged, it had been occupied by John B. Morrison with his goods and furniture, and he occasionally slept in it. And it would be drawing the distinction exceedingly fine, and with simply technical precision, to hold that a dwelling house was a building other than a dwelling house for the reason that some one was not staying in it just at the time it was broken into and the occupant's goods were stolen therefrom. If it had been described as any other kind of building, the accused, no doubt,

would have recognized it to be a dwelling house, for the reason that the occupant still had his goods, and was sometimes sleeping therein. But it changes character according to the standpoint from which it is viewed.

The indictment charging both burglary and larceny, the jury could find the accused guilty of either, and a general finding is considered to cover the burglary, but not the larceny, according to the holding of this Court in the case of *State v. McClung*, 35 W. Va. 280 (13 S. E. Rep. 654) to which the counsel are referred.

No error appearing in the record prejudicial to the accused, the judgment is affirmed.

CHARLESTON.

TRICE v. CHESAPEAKE & O. RY. CO.

Submitted January 15, 1895—Decided March 27, 1895.

1. RAILWAY TICKET—EJECTION OF PASSENGER—DAMAGES.

By mistake a ticket agent selling a mileage ticket good for one year stamps upon it, as the date of issue, 4th March, 1892, instead of 1893. The passenger tenders it on 24th April, 1893, in payment of fare, but it is refused, and he is ejected for non-payment of fare. The passenger can recover damages.

2. RAILWAY TICKET—EJECTION OF PASSENGER—DAMAGES.

By mistake a ticket agent selling a mileage ticket good for one year from issue stamps upon it, as the date of issue, 4th March, 1892, instead of 1893, and after the figures 189— writes the figure 3, making the date of the expiration of the book 4th March, 1893, and then corrects the latter mistake by writing over the 3 the figure 4, making it read 1894, not correcting the 1892. On 24th April 1893, the holder tenders this book in payment of fare, but it is rejected as out of date, and he is ejected from the train, after explaining to the collector that the agent had made the mistake, and he had himself not altered the ticket, and asking that the collector wait until the train reached Huntington, where the book was sold, so that the collector would be satisfied that the book had not been fraudulently altered; and the collector made no inquiry at any of several telegraph stations of the railroad company as to it. The passenger can recover damages of the company.

40	271
40	696

40	271
48	488

40	271
47	543

40	271
62	49
62	415
62	653

40	271
65	262

3. DAMAGES—VERDICT OF JURY

Where the case is one of indeterminate damages, and the law gives no specific rule of compensation, the decision of the jury upon the amount of damages is generally conclusive, unless the amount is so large or small as to induce the belief that the jury was influenced by passion, partiality, corruption, or prejudice, or misled by some mistaken view of the case; but, if so excessive as to induce such belief, it will be set aside.

SIMMS & ENSLOW for plaintiff in error, cited 34 W. Va. 65; Hutch. Car. (2d Ed) § 580, p. 675; Id. § 3801; 20 U. C. Q. B. 24, 27; 11 Lea (Tenn.) 98; 45 Iowa 69; 50 Iowa 79; 49 Mich. 184; 36 W. Va. 318.

E. W. WILSON for defendant in error, cited 36 W. Va. 318, and 39 W. Va. 475.

BRANNON, JUDGE:

Trice sued the Chesapeake and Ohio Railway Company, in Cabell county, for damages for his ejectment from a train, and, on demurrer to evidence, recovered judgment for five hundred and fifty dollars, and the defendant brought the case here.

The facts, in short, are as follows: Trice boarded a passenger train on the 24th of April, 1893, at Charleston, to go to Huntington. He had a mileage ticket issued for one thousand miles, having remaining unused coupons for forty miles' travel. These tickets are good for one year from issue. This one had stamped upon it as date of its issue March 4, 1892. For date of expiration there were printed on it the figures 189—, to be filled out with the particular year of issue; and there was inserted in ink, with the pen, the figure three, making the date of expiration 4th March, 1893; but over the three was written with pen and ink the figure 4, making the expiration considering the figure 4 as the right one, and disregarding the figure 3, 4th March, 1894. The question is, when was this ticket issued? When fare was demanded, Trice gave the collector his mileage ticket as paying forty miles' fare, and fifty cents in money, which the collector accepted, and passed on, saying that there was some change coming to Trice, which he would hand him.

The collector soon returned, saying to Trice that his ticket was not good, because out of date. When the dates on the ticket were called to his attention, Trice insisted that the ticket was good; that he had purchased it at the Huntington office 4th March, 1893, and that the stamp of 1892 as the date of purchase was a mistake in the agent who sold it to him; that even though the stamp gave the date of 1892 for its purchase, still the date of expiration on the ticket was 1894. Whereupon the collector said: "That won't help you any. That four has been made there since you bought the ticket. You have changed that three to a four. I won't accept it." Trice still insisted upon the correctness and validity of the ticket, and said, if there was any mistake, it could be rectified at Huntington, and the collector would there find out that it was genuine and correct, to which the collector replied that he did not have to go to Huntington to ascertain about it, and that he would have to put Trice off, and told him to get off at next stop. Trice did not get off at the next stop, Spring Hill; and, after the train left Spring Hill, the collector said to Trice that he would have to pay fare or get off the train, and handed him back the mileage book and fifty cents. Then the conductor came to him, inspected the book, said the collector was right in rejecting it, and Trice would have to get off at St. Albans, which he did under protest, still demanding right of passage.

Was the mileage ticket still good for forty miles' travel? That depends on whether it was issued in 1892 or 1893, and this depends on whether the stamp date, 4th March, 1892, was a mistake as to the year, or was right, and the figure 4, written over the figure 3 in its date of expiration, was wrongfully put there by forgery. Trice swears he purchased the ticket 4th March, 1893, and that he did not put the figure 4 in the date of expiration, but that the agent at Huntington did. There is no evidence to the contrary; and, even if we were not deciding the case on a demurrer to evidence, we would be required to say that the facts are as Trice states them; but the more certainly and plainly that is our duty under principles governing us upon a demurrer to evidence. Where is the registry kept at the Huntington office, if any

was kept, showing sales of mileage books by date and number? Where the agent who sold this book? They are absent, and their absence unaccounted for. No alteration in the ticket is shown. We must consequently say that the stamped date of issue is a mistake of the selling agent, as also the date of 1893 for expiration a mistake, and that he discovered it, and corrected it by writing the figure 4 over the figure 3 in date of expiration, and omitted to change the 1892 in date of issuance. It does seem strange that the selling agent would retain as late as 4th March, 1893, the old stamp of 1892, and still more that he would put 1893 in date of expiration if the book was issued in 1893, making two mistakes. Did this happen only in the case of this ticket? How did it happen? We do not know. But the evidence shows mistaken date of issuance. The collector could not say that the date 1892 in date of issue was infallibly right, and that the date 1894 in date of expiration was wrong, unless the latter was forgery. Indeed, the fact that the figure 4 was written in ink over the figure 3 would indicate that 1892 was erroneous and 1894 right, unless forged, and the ink of the figures 3 and 4 and in other parts seem the same, and the 4 in day of month made like the 4 in the year 1894. Thus, the passenger had a lawful ticket, and was wrongfully ejected. There is nothing forbidding oral evidence to show mistake in date. The mileage book is a contract, but, under the rule that error in mere date may be shown, I take it the true date can be shown. The defense is only that the collector acted under a rule of the company directed to collectors, saying that "a ticket bearing any evidence of alteration or erasure should not be accepted for passage, unless collectors are satisfied that the same has been done in ignorance and contrary to instructions by agent who sold the ticket." That is good between company and collectors; but can it destroy the right of a passenger under a ticket which in fact has not been mutilated or changed? Suppose the collector should find marks of mutilation or alteration when a court should find none. Would the rights of a party be defeated in a court by the decision of the collector? The rule is prudent; but if an instance of its ap-

plication is one of misapplication or error, and thereby one guilty of no fault is injured, the company, like others, must answer for the consequence of its action or the mistakes of its agents, though well meant. This ticket was apparently good, or at least, as apparently good as apparently bad; more apparently good than bad.

In the *McKay Case*, 34 W. Va. 65 (11 S. E. Rep. 737) we held that where a railroad company agreed to sell a ticket for passage between certain points, but by mistake wrote the ticket for passage to other points, the passenger could not ask passage where the ticket did not carry him, it being apparently not good for the passage demanded; and the passenger leaving the car, at the command of the conductor, but without force, could not sue in tort, but must sue for breach of contract by the company in agreeing to carry him that passage, and failing therein by not giving him the ticket contracted for. That case was confessedly somewhat close, but I still think it was rightly decided, and sustained by cases of eminent authority. There the ticket showed nothing for, and all against, the right of the passenger to ride, which he claimed, and was transparently not good—a mere blank or nullity as to the ride claimed; while here it is apparently good, more apparently good than bad, and turning out in the end to be good. There is a difference, though it cost reflection to see it. In this case I go upon the theory, which I think is correct, that the plaintiff's grievance is not a breach of contract in agreeing to sell him a ticket for a certain passage, and giving him a wrong ticket, as in the *McCay Case*, but in the fact that he had a ticket entitling him to go to Huntington as he demanded, and in its wrongful rejection and his expulsion. He had a ticket turning out ultimately to have been good from the start. The confusion as to date arising from the agent's error, without fault in the passenger, does not change its validity. In *Railroad Co. v. Rice*, 64 Md. 63 (21 Atl. 97), a party had a ticket for a round trip containing two coupons, one each way; and the conductor tore off the wrong one, and left the other one with the passenger for return, and the conductor on the return ejected him, and he recovered. He

had bought a ticket good on its face, and the mistake of the conductor could not change it. His rights depended on his ticket good from the first as issued, not on the conductor's error. So in *Railroad Co. v. Fix*, 88 Ind. 381, where conductor tore off wrong coupon in round-trip ticket. This passenger, Trice, made explanation as to the ticket to the collector, and, what showed his good faith, asked the collector to wait until they got to Huntington, where any mistake could be corrected. This was a reasonable proposition no doubt. In *Hufford v. Railroad Co.* (Mich.) 31 N. W. 544, it was held that where an agent had made a mistake in selling a ticket, the conductor ought to rely on the passenger's statement as true, until found to be untrue, without regard to words, figures or other marks on the ticket, and the company was held liable for ejection. And then this was a train stopping at all stations, nearly a dozen, between Charleston and Huntington, and many of them telegraph stations, so that the collector could have ascertained about the ticket by inquiry of the Huntington office without cost. He took no steps to ascertain the truth, but assumed a forgery on Trice's part.

Is the amount of damages found excessive? While, from the first I have had no doubt of the plaintiff's right to recover, my inclination was to think that the jury had imposed too heavy a hand on the company, and compensated Trice beyond any harm or loss he suffered. Not a finger was laid upon him to force him from the train, but he got off of his own action, under protest. It does not appear that he suffered from weather. He got off at a regular station. It is not shown that he was greatly delayed, or lost anything thereby. He says he had important business in Huntington, but what, or whether he lost anything, he does not say. There is no evidence that he was exposed to public humiliation, or that what was said was heard by other passengers. The appearance of the ticket might well suggest a doubt to the conductor. Where a passenger is wrongfully ejected from a train by a conductor for non-payment of fare, in good faith, in execution of the rules of the company, as he supposes, without malicious intent or circumstances of indignity

or insult, without force, there ought not to be heavy or exemplary damages, but only such as compensate actual loss. *Railroad Co. v. Guinan*, 47 Am. Rep. 279; *Fitzgerald v. Railroad Co.*, 50 Iowa 79; *Car Co. v. Reed*, 75 Ill. 125.

But here the collector charged upon Trice the crime of forgery, and, where circumstances of insult and indignity attend, that fact may be considered fairly by a jury in estimating damages. In *Railroad Co. v. Fix*, *supra*, where the verdict was six hundred dollars, a distinguishing feature was the conductor's charge that plaintiff wanted to cheat the company. This is a matter considered everywhere. But as is said in 3 Suth. Dam. § 953: "In actions for personal injuries, and in cases generally where there is no fixed legal rule of compensation, the theory of the law is that the decision of the jury is conclusive, unless they have been misled, or their verdict has been influenced by corruption, passion, or prejudice. Unless the verdict finds an amount so out of proportion to the actual injury as to evince such misleading, or the presence of some malign influence, it will be sustained, although it may materially differ from the judgment of the court. But if the amount of the verdict so far exceeds or falls short of what to the court appears to be just compensation as to induce the belief that the jury have not given the case a fair and dispassionate consideration, it will be set aside." Our own authorities are the same, and in such cases hold that the finding of the jury governs, unless so excessive as to induce the belief that it was governed by partiality, corruption or prejudice, or misled by some mistaken view of the merits of the case. *Farish & Co. v. Reigle*, 11 Gratt. 697; *Pegram v. Stortz*, 31 W. Va. 220 (6 S. E. Rep. 485); *Boster v. Railway*, 36 W. Va. 318 (15 S. E. Rep. 158); *Sheets v. Railroad Co.*, 39 W. Va. 475 (20 S. E. Rep. 566). Under these principles, we can not interfere with the amount found. In a note to *Railroad Co. v. Guinan*, 13 Am. & Eng. R. Cas. 41, are collected cases in which verdicts have been held excessive for ejection of passengers and others where large verdicts have been sustained, but they afford no general guide. Certainly, where the conductor is honestly executing his duty, though he is mistaken, and there is no force,

insult, or harsh treatment, the finding ought to be only compensatory, not punitive and heavy.

We think this verdict heavy, but we hesitate to interfere with the finding of the jury. Affirmed.

CHARLESTON.

WILSON v. ROSS, COUNTY ASSESSOR.

Submitted January 15, 1895—Decided March 27, 1895.

40	278
e 51	103
51	104
40	278
162	319

1. LIQUOR LICENSE—TOWN COUNCIL.

The act of February 24, 1869, amending the charter of the town of Ceredo, confers upon the council of that town the sole power to grant or not grant a state license for the sale of intoxicating liquors within the limits of said town.

2. LIQUOR LICENSE—TOWN COUNCIL—CONSTITUTIONAL LAW.

Such act is not repugnant to the constitution of the state (see section forty six of article six, and section twenty four of article eight, of the state constitution), and such sole power to grant such license or not is recognized by section eleven of chapter thirty two of the Code as vested in the municipal authorities of such town.

J. S. MARCUM for plaintiff in error, cited Acts 1869, c. 52; Const. 1863, Art. VII, s. 4; 27 W. Va. 182; 33 W. Va. 146.

W. W. MARCUM and VINSON & THOMPSON for defendant in error, cited Acts 1869, c. 52; Const. 1863, Art. XI, s. 4; 27 W. Va. 182; 33 W. Va. 146.

HOLT, PRESIDENT:

Upon a writ of error to a judgment of the Circuit Court of Wayne county, rendered on the 6th day of June, 1894, awarding against appellant, J. M. Ross, as assessor of said county, a peremptory writ of *mandamus*, commanding him to deliver to the defendant in error, B. F. Wilson, a certificate and statement of the amount of the state tax assessed against the said Wilson as a retail liquor dealer.

The case was decided upon the facts as they appear by the pleadings. The facts are in substance as follows: On

the 22d day of May, 1894, the common council of the town of Ceredo granted to defendant, B. F. Wilson, a license to sell at retail spirituous liquors in the Millender Block, in that town; and thereupon he delivered to J. M. Ross, the assessor of the county, a copy of said order, and demanded a certificate of the license he wished to obtain, and the amount of taxes to be paid thereon to the state, but J. M. Ross, the assessor, refused to do so.

On Wilson's petition, an alternative writ of *mandamus* was awarded against Ross as assessor on the 31st day of May, 1894, reciting the foregoing facts, and the additional fact that under and by virtue of the laws of the state of West Virginia, and of the power thereby granted to the common council of the town of Ceredo, it has the sole right to grant permits for the sale of intoxicating liquors within its corporate limits. To this Ross made answer admitting all the foregoing facts alleged, except the sole right as claimed on behalf of the common council of the town of Ceredo, and alleging that B. F. Wilson had not applied to and received from the County Court of Wayne county, in which was situated the town of Ceredo, an order authorizing the issuance to him of such license, and that said council did not have, under section 11 of chapter 32 of the Code, the sole power of granting such license. On demurrer to said answer and return, the court held the same insufficient, and awarded the peremptory writ.

The question is, does the common council of the town of Ceredo have such sole power to grant such license? The law upon the subject is as follows: "No person without a state license therefor shall * * * * sell * * * * spirituous liquors, wine, porter, ale or beer, or any drink of a like nature." See Code, c. 32, s. 1. "The state license mentioned in the first section shall be issued only when authorized by the County Court of the county, * * * * except that, where the act, occupation, or business for which such state license is necessary is to be done or carried on in an incorporated city, village, or town, the license shall be issued

only when authorized under the charter of said city, village, or town, by the council thereof." *Id.* s. 10.

The constitutional provisions on the subject are as follows: Section 46 of article 6 provides that "laws may be passed regulating or prohibiting the sale of intoxicating liquors within the limits of this state." Section 24 of article 8 provides that the County Courts shall also, under such regulations as may be prescribed by law, have the superintendence and administration of the internal police and fiscal affairs of their counties; provided, that no license for the sale of intoxicating liquors in any incorporated city, town or village shall be granted without the consent of the municipal authorities thereof first had and obtained.

These provisions were construed in the case of *Moundsville v. Fountain* (1885) 27 W. Va. 182, in which it was said (page 188) that the legislature may confer on the cities and towns the exclusive authority to regulate or prohibit the sale of liquors, which is understood to have been done in certain cases, the cities of Wheeling and Wellsburg for example.

Section 11, chapter 32, Code, 1891, p. 234, recognizes and provides for such cases, "wherein the municipal authorities are vested with the sole power of granting such license."

So that the sole question here is, is the town of Ceredo in such class? That is to be ascertained by reading its charter in connection with the general laws upon the subject. The charter was granted by act passed on the 23d day of February, 1866 (Acts, 1866, p. 40). Section 21 reads as follows: "When anything for which a state license is required is to be done within the said town the council may require a town license to be had for doing the same, and may impose a tax thereon for the use of the town, and the council may in any case require from the person so licensed a bond with sureties in such penalties and with such condition as it may determine." By act of the 24th of February, 1869, the above section was amended and re-enacted so as to read as follows: "When anything for which a state license is required is to be done within the limits of said town, the council may decide whether such license may be granted or not, and if

granted it shall be assessed and collected, the same as if granted by the supervisors of Wayne county; in addition to the state tax for such license, the council may require an additional tax for the use of the town, and in addition to the bond and sureties required by the state, the council may require such additional bonds and sureties as they may determine."

Do these acts invest the municipal authorities of the town of Ceredo with the sole power of granting such license? I can not see what other reasonable construction can be given them. The council is expressly given the power to grant or refuse such state license, and that such power does not need the sanction of the County Court is made plain by what immediately follows: "And if granted it shall be assessed and collected, the same as if granted by the supervisors of Wayne county;" by whom it was not granted, and need not be granted, being a plain and necessary inference. So, also, it is an inference from the authority given to take the bonds and sureties required by the state, and makes this construction still plainer by proceeding to say that, "in addition to the state tax for such license, the council may require an additional tax for the use of the town," and may require additional bonds to those required by the state. This charter, as amended, is older than the constitution of 1872, which for the first time gives an incorporated city, town and village a constitutional protection against the licensed sale of intoxicating liquors, without the consent of their municipal authorities, and was evidently designed to subserve the same purpose.

The question remains, has the charter of incorporation been modified in this regard by any subsequent law? for such municipal charter is not a contract, nor of the nature of contracts. Therefore it can not have the obligation of a contract, within the meaning of section 10, article I, of the constitution of the United States, and of section 4 of article III of the state constitution; and may be changed at pleasure, when the constitutional rights of creditors and others are not in-

vaded. 1 Dill. Mun. Corp. § 63 (36); *Dartmouth College v. Woodward* (1819) 4 Wheat. 518, 624, 708, 712.

Section 46 of article VI of the constitution provides that "laws may be passed regulating or prohibiting the sale of intoxicating liquors within this state." This provision, so far from restraining the power of the legislature to confer such power upon the town as to granting license, would seem to grant and confirm it; and subject to this provision, and under such regulations as may be prescribed by law, the County Courts shall have the superintendence and administration of the internal police and fiscal affairs of the counties. See *Moundsville v. Fountain*, 27 W. Va. 182, 187. Therefore it can not be said that the constitution of 1872 has taken away from the municipal authorities of the town of Ceredo the power to grant such state license. I have not been able to find any statute that expressly or by necessary implication takes away such power. On the contrary, section 11, chapter 32, Code, 1891 plainly recognizes the continued existence of such power as solely vested in the municipal authorities of the town in question.

This being so, the judgment complained of is right, and must be affirmed.

CHARLESTON.

BOYD *et al.* v. WOOLWINE *et al.*

Submitted January 23, 1895—Decided March 30, 1895.

1. EASEMENT—PRIVATE RIGHT OF WAY.

A private right of way is the right of going over another man's land, and may be acquired by grant, express or implied, or by prescription.

2. EASEMENT—WAY OF NECESSITY.

When a man grants land to another in the middle of land retained, he impliedly gives the grantee a way to come at it, across the land retained. This is an instance of what is called a "way of necessity."

40	282
41	518
40	282
42	449
40	282
46	347
40	282
49	180
40	282
56	49
d57	335
40	282
58	310
58	461
58	674
40	282
e 60	400
40	282
61	518
61	518
40	282
f62	54
62	224

3. EASEMENT—PRIVATE RIGHT OF WAY—UNINTERRUPTED USE.

A private right of way by prescription may be acquired by a visible, continuous, uninterrupted use for twenty years under a *bona fide* claim of right.

4. EASEMENT—PASSWAY—CONTINUOUS USE—HIGHWAY.

The continuous and uninterrupted use of a passway for twenty years or more by the people generally, though with the knowledge and consent of the owner of the land, will not constitute it a county highway; it must be accepted or in some way recognized as such by the county court.

5. EASEMENT—INJUNCTION—PRIVATE WAY.

A mandatory injunction will lie to cause an obstructed or closed private way to be cleared and opened for the use of the owner.

A case in which these principles are applied.

J. J. SPOPE and JAS. H. MILLER for appellants, cited 33 W. Va. 307; 36 W. Va. 427; 37 Gratt. 892; 6 Law. R. R. & P. § 2776; Wash. Ease. § 31; 33 W. Va. 315; 29 Vt. 44; 19 Am. & Eng. Ency. Law, p. 9; Wash. Ease. p. 114; 23 Iowa 511; 57 Am. Dec. 297; Woolr. Ways 19, 188; 3 Kent. 442; Elliott's Roads and Streets 139; 2 Min. Inst. p. 558; 1 Lom. Dig. 783; 2 Min. Inst. p. 560; 74 Am. Dec. 629; 12 Id. 584; 44 Id. 41; 109 Ind. 586; 69 Wis. 613; 27 S. Car. 549; 13 Atl. Rep. 81; 13 Gray (Mass.) 188; 100 N. Y. 455; 3 Nev. 361; 93 Am. Dec. 409; 24 N. W. 440; 57 Am. Dec. 294; 3 McCord (S. C.) 194; 10 Hisk (Tenn.) 329; 77 Ill. 570; 54 Ga. 233; 2 Min. Inst. pp. 19, 20; 4 Rand. 58; 3 Leigh 318; 3 Kent 441; Code, W. Va., c. 104, s. 1; 11 Am. Dec. 661, 663; Wash. Ease. 66; 20 Am. Dec. 524, 525; 7 Id. 193, note; Godd. Ease. p. 134; 36 W. Va. 437; 18 W. Va. 454; 5 N. Y. 9; 13 Am. Dec. 741, 745; 19 Am. & Eng. Ency. Law, pp. 19, 20; 38 Am. Dec. 61; 77 Ill. 570; 64 Am. Dec. 76; 49 Id. 99; 126 Mass. 445; 1 Barb. Ch. (N. Y.) 353; Wash. Ease. 259; 13 Am. Dec. 741; 94 Id. 260; 38 Id. 61; 35 How. Pr. N. Y. 139; 126 Mass. 445; 22 N. Y. 217; 27 N. H. 448; 59 Am. Dec. 387; 7 C. & P. 761; 69 Cal. 199; 19 Am. & Eng. Ency. Law 97; 3 Taunt. 24; 85 Am. Dec. 671; 117 Ill. 643; 19 Am. & Eng. Ency. Law 106; 13 Am. Dec. 741; 42 Ind. 44; 5 Harr. (2d) 21; 1 Whar. Ev. § 264; 1 Green. Ev. § 113; 1 Whar. Ev. § 203; 1 Green. Ev. § 109; 2 Mun. 468.

THOMAS G. MANN for appellees, cited 6 Rob. Pr. 804; 3

Kent. 419 (top page); 8 Gratt. 632; 1 Lomax Dig. 524; 2 Min. Inst. 20.

HOLT, PRESIDENT:

This was a bill of injunction in the Circuit Court of Summers county to protect and enforce a private right of way.

On the 23d day of June, 1892, the injunction was granted the plaintiffs restraining the defendant Caroline Woolwine and the other defendants from obstructing the road in the bill mentioned, and requiring them to unlock the gates and remove all other obstructions placed in the road by defendants, and leave the same open and unobstructed until further order. All the defendants put in answers, the plaintiffs replied, depositions were taken, exhibits filed, and the cause coming on for final hearing on the 15th day of September, 1893, before a special judge, the injunction was dissolved, and the bill dismissed, with costs, and from this decree this appeal was allowed the plaintiffs.

The bill was demurred to. Does it make out a case for relief? The plaintiffs allege that they are the owners of valuable real estate on which they reside, situate in Talcott district, Summers county, on the waters of Eagle branch, a small stream flowing into Greenbrier river; that defendants are owners of a tract of land below on said branch;—this latter tract appears to have been conveyed by Augustus Gwinn and wife to defendant Caroline Woolwine and her children, by deed dated the 7th day of April, 1883, as containing twenty four acres, lying on Greenbrier river, and including the mouth of Eagle branch;—that when plaintiffs bought their land and commenced to reside upon it, twenty-four years ago, there was an open and notorious way running up said branch for persons to pass and repass from plaintiffs' lands, through the twenty four acres now belonging to defendants, to the public highway; that it has been open to such travel time out of mind. Plaintiffs also allege that they own an easement as a private right of way along said Eagle Branch road; that for twenty four years they have used and enjoyed the same continuously and without inter-

ruption, openly and visibly, and claiming the same as a private right of gate-way; that they have worked upon it and kept it in repair without objection or molestation on the part of the defendants, who had made two small changes in that part running through their own land, after having first asked for and obtained from plaintiffs permission to make them; that plaintiffs have no other way through their own premises to the public road; that this easement is the only way they own by which they can have access to the public highway to mill, to market and to church, and that there is a public school house on the branch called "Boyd's School House;" that they are informed that there was a parol agreement between defendants and the person from whom defendants bought their land that this way an easement was to remain open and unobstructed by defendants; that on the 1st day of June, 1892, defendants conspired together to injure and annoy plaintiffs by preventing their use of this pass-way, and to that end put trees and other obstructions across the same, closed and locked the gates and refused to open them, or to permit plaintiffs to pass through, though they were often requested to do so—by all which plaintiffs are greatly damaged and annoyed. Plaintiffs prayed for the injunction already mentioned as temporarily granted, and for general relief.

Such is the substance of the bill, with the order in which the facts are set forth slightly changed. Some defects are obvious, such as the allegation made on information, which plaintiffs, perhaps, did not believe to be true. The plaintiffs, however, could to advantage have made the location and title of their own lands more definite and explicit, but I shall take for granted that some of these facts sufficiently set forth make out a *prima facie* case, two circuit judges having so held, and nothing to the contrary being claimed in defendants' brief.

First. As to the public right of way.

I can scarcely think of anything a private right of way would be likely to embrace beyond the public one while the latter lasted; yet it is easy to see that the two are not nec-

essarily inconsistent, and that the former may be coexistent with the latter, and so it has been held. *Brownlow v. Tomlinson*, 1 Man. & G. 484. The proof shows that this road has been used as a way continuously by the public, in the sense of being traveled by any and all who saw fit to pass over it, for sixty years or more, going back to a time when all these lands were in a state of nature, uncleared and unfenced. When the tract of twenty four acres was first fenced and gates put across the road does not appear, but it does appear that it was not done for the purpose, and did not have the effect, of putting a stop to its use; but the erection of the gates without leave of the county court, tends to show that it was not, or at least was not regarded as a county road. It does not appear that it was ever a thoroughfare. It is now, and has long been, only a *cul de sac* a mile or so long, opening out into the highway after passing through the land of defendants. Augustus Gwinn became the owner of the land in 1858, and this was a public pass-way then, and has been ever since. He sold to plaintiff Taylor and his father where the former now resides, and it was the agreement that plaintiff was to have the right to use this road as an outlet to the public road, but there was no evidence in writing of such agreement or of such sale. Gwinn afterwards sold and conveyed the twenty four acres to defendants, who knew of this public pass-way, and agreed to leave it open, but there was no reservation thereof in the deed, or any contract to that effect in writing. This, together with such long user, is the evidence of dedication to the public of this right of way. No acceptance thereof by the County Court appears, and it must be taken that none was ever made, as the County Court speaks only by record. It has long been the settled law in this state that the mere user of a road by the public, for however long a time, will not make it a public road. On the contrary, the mere permission by the owner of the land to the public to pass over the road is, without more, to be regarded as a license revocable at his pleasure. A road dedicated to the public must in some way, directly or by inference, be accepted by the County Court upon its records before it can become a public county road. This may be done

by laying it off into precincts or road districts, by appointing for it an overseer or surveyor, or by any act, formal or informal, showing plainly that it claims and treats the road as a public one. And if, after notice of such claim, the owner of the soil permitted the road to be passed over for any time, the road might well be inferred to be a public road. See *Brander v. Justices of Chesterfield*, 5 Call. 548; *Clarke v. Mayo*, 4 Call 374; *Com. v. Kelly* (1851) 8 Gratt. 632; *Ball v. Cox*, 29 W. Va. 407 (1 S. E. Rep. 673). It is true that section 31, chapter 43, of the Code, by change of language made in 1881, now reads as follows: "Every road * * * used and occupied as a public road * * * shall in all courts and places be taken and deemed to be a public road * * * whenever the establishment thereof as such may come in question;" yet the Court has held that this means used and occupied under the sanction of the county court in some way expressed. See *Ball v. Cox*, 29 W. Va. 407 (1 S. E. Rep. 673); *Talbott v. King*, 32 W. Va. 6 (9 S. E. Rep. 48); *Yates v. Town of West Grafton*, 33 W. Va. 507 (11 S. E. Rep. 8); *People v. Underhill*, 114 N. Y. 316 (39 N. E. Rep. 333). This doctrine and this construction of this statute find their reason and justification in the following facts: In this country new and sparsely settled as it is, pass-ways run here and there used more or less during more than a lifetime of one generation with the silent permission of the owners of the land, but without the faintest intent on their part to dedicate, or thought that they were thereby dedicating, a right of way to the public. In contemplation of our law of county police and economy, there can be no county road which is not in some way committed to the care and supervision of some road surveyor, whose duty it is to see that it is kept open and free from obstruction. Is the county court to be held liable in damages to any person who has sustained an injury in person or property by reason of a road being out of repair, which it has never in any way accepted or recognized as a public county road, or caused to be occupied as such by its road officers. See section 53, chapter 43, of the Code. But the question remains, have the plaintiffs shown themselves to have a private right

of way. This is quite a different thing, not only in its nature and extent, but in the methods of its creation and the evidence of its existence. It falls under the head of an easement, an incorporeal right, is of many varieties and with various characteristics, according to its own peculiar facts, which need not be noticed here or discussed further than they are brought into question by this record.

Second. It is claimed that plaintiffs have a right of way through defendants' land of necessity.

A way of necessity arises as an incident to a grant of land surrounded wholly by that of the grantor, when otherwise the land granted would not be accessible and the grantee would derive no benefit from the grant. It is an instance of the maxim that one is always understood to intend, as an incident, to grant whatever is necessary to give effect thereto, which is in the grantor's power to bestow. 2 Minor's Inst. 20; *Rogerson v. Shepherd*, 33 W. Va. 307 (10 S. E. Rep. 632); *Nichols v. Luce*, (1834) 24 Pick. 102; 6 Rob. Prac. 804. But these plaintiffs do not allege in their bill that they acquired their lands by purchase or conveyance from Augustus Gwinn or from any other person, but simply say that they are the owners of the land on which they reside, without alleging when, how, or from whom they acquired title thereto. By their evidence they make out a very clear case of inaccessibility into their homes, and out to the mill, market, church and courthouse and highway, without using the road in controversy; such a case of necessity as the county court would not hesitate to relieve them from by making it a public road if addressed to that body (*Lewis v. Washington*, 5 Gratt. 265) but they produce no competent proof here that they have any title at all to their lands except their actual possession, which makes them *prima facie* owners in fee, sufficient, perhaps, for the purpose of this case in other aspects, but certainly giving us no clue as to how or why they own this way as a way of necessity. They also claim title to this way by prescription. This right is fully set forth in their bill and clearly made out by the proof. Augustus Gwinn, while he was still the owner of the twenty four acres at the mouth of Eagle branch, agreed verbally that plaintiff Taylor and

the others living on the branch should have the use of the road in dispute as an outlet to the public road. *Trueheart v. Price* (1811) 2 Mun. 468; *McKenzie v. Elliott* (Ill., 1890) 24 N. E. Rep. 965. Under this claim of right, and thus claiming it as their own, they have visibly and continuously used and enjoyed this pass-way without interruption for more than twenty years, working it and keeping it in some sort of repair during all that period, with the help of some of the defendants who resided on it where it runs through their own land. By such adversary user for that period of time they acquired a right to the unobstructed use of said way. *Rogerson v. Shepherd*, 33 W. Va. 307 (10 S. E. Rep. 632); *Stokes v. Upper Appomatox Co.* (1931) 3 Leigh 318; *Coulter v. Hunter* (1826) 4 Rand. 58.

If such is the right of the plaintiff, no question is made that this is their proper remedy; in fact, their only plain, adequate and complete remedy, seeing that it is the unobstructed use of the road they are after, and not damages for the obstruction of it.

Therefore the decree of September 15, 1893, complained of, must be set aside, and the temporary injunction awarded on the 23d day of July, 1892, be made perpetual.

CHARLESTON.

BRADY v STILTNER.

Submitted January 29, 1895—Decided March 30, 1895.

1. CRIMINAL LAW — PRELIMINARY EXAMINATION — PROBABLE CAUSE.

The waiver of a preliminary examination by a person charged with crime is *prima facie* evidence of probable cause.

2. CRIMINAL LAW—PROBABLE CAUSE—PRELIMINARY EXAMINATION—GRAND JURY.

"The discharge by a justice of the plaintiff who has been arrested and brought before him for examination or the refusal of the grand jury to indict him is *prima facie* evidence of want of probable cause but it is liable to be rebutted by proof." When

40	289
41	120
40	289
46	372
40	289
47	728
40	289
49	685
50	590
50	585
40	289
61	250

the refusal of the grand jury to indict is opposed to the refusal of the justice to discharge, one rebuts the other, so as to render neither *prima facie* evidence of the existence or want of probable cause; and, if the plaintiff manages in any way to have the evidence for his defense considered by the grand jury, their finding is tantamount to an acquittal by a petit jury, and is not *prima facie* evidence of the want of probable cause on the part of the prosecutor.

W. E. R. BYRNE for plaintiff in error, cited 1 Hill. Torts, c. 16, § 27b; 2 Green. Ev. § 455; 15 S. E. Rep. 591; 22 W. Va. 234; 4 Mun. 462; 38 Am. Dec. 228; 31 Id. 442; 14 Am. & Eng. Ency. Law 63-70; 84 Va. 205; 10 Mo. 728; 68 Mo. 627; 51 Cal. 140; 41 Fed. Rep. 898.

DENT, JUDGE:

This is a case of malicious prosecution of G. L. Brady, plaintiff, against F. P. Stiltner, defendant, from the Circuit Court of Webster county. The facts are as follows, to wit:

In a certain suit between the plaintiff and the defendant the matter in dispute appears to have been whether said defendant agreed to charge twenty five cents or fifty cents for the effectual services of a certain animal, each time such animal was used. The plaintiff testified that the defendant agreed with him only to charge him twenty five cents. Thereupon the defendant made the necessary affidavit that the plaintiff had sworn falsely, and caused a warrant to issue, on which the plaintiff was arrested, and, being brought before the justice, waived examination on the charge, and gave a recognizance for his appearance before the Circuit Court to answer an indictment. When the grand jury met to inquire of the charge, after the defendant's evidence had been heard, plaintiff had his two sons and attorney sworn and sent before the grand jury to testify regarding the charge. The grand jury failed to find an indictment and the plaintiff was discharged. He then sued the defendant for malicious prosecution, and obtained a judgment for six hundred dollars. From this judgment a writ of error was granted the defendant, who here relies on the following errors, to wit:

"First. That the court erred in giving the following three instructions for the plaintiff: 'No. 4. The court instructs the

jury that if they believe from the evidence that P. F. Stiltner made a complaint before J. A. Howell, justice, accusing defendant G. L. Brady, with committing perjury, and if the said Brady waived an examination before the justice, and was required to enter into a recognizance to appear before the Circuit Court to answer an indictment to be preferred against him by the grand jury, and if the said Stiltner appeared before the grand jury as a witness against said Brady, and if the grand jury refused or failed to find an indictment against said Brady for the alleged offense, and he was discharged by the court, it is *prima facie* evidence of want of probable cause on the part of said Stiltner in making the accusation against said Brady and procuring his arrest, and it throws the burden of proof upon said Stiltner to show that he had probable cause in making the accusation aforesaid, and the jury have the right to infer malice on the part of said Stiltner if it appears that there was want of probable cause.' 'No. 7. The court instructs the jury that what will or will not amount to probable cause will depend upon the circumstances of the case, and the discharge of the plaintiff, Brady, by the grand jury is *prima facie* evidence of the want of probable cause, and sufficient to throw upon the defendant, Stiltner, the burden of proving the contrary.' 'No. 8. The court instructs the jury that it is the duty of a grand jury to indict a person who is charged with an offense, and recognized to appear before the Circuit Court to answer an indictment to be preferred against him; and if it appears by the testimony before the grand jury that there is probable cause of the guilt of the person it is the duty of the grand jury to indict him, and, if they fail or refuse to indict, it is *prima facie* evidence that there was want of probable cause.' "

"*Second.* The court erred in refusing to give the following instructions for the defendant: 'No. 1. The jury is instructed that if they believe from the evidence that the defendant believed, either from facts within his own knowledge or from information derived from others that the plaintiff made the false statement on oath as stated in the complaint upon which the warrant of arrest was issued by the justice, then the defendant had probable cause upon which to base such complaint,

and the jury should find for the defendant.' 'No. 2. The jury is instructed that if they believe from the evidence that the plaintiff was arrested upon a warrant issued upon a complaint made by the defendant, and taken before a justice for examination, and that the plaintiff waived such examination, and entered into a recognizance to answer an indictment upon the matter charged in said complaint, then such waiver is *prima facie* evidence that there was at least probable cause sufficient to justify the defendant in making the said complaint.' 'No. 4. The jury is instructed that if they believe from the evidence in this case that there was probable cause sufficient to warrant the justice in holding the plaintiff to answer an indictment, then it is immaterial whether the grand jury found such indictment or not, or whether or not there was evidence sufficient to warrant the grand jury in finding such indictment.' 'No. 8. If the jury believe from the evidence that the plaintiff or his attorney went before the grand jury, or sent any witness or witnesses before the grand jury, to prevent the finding of an indictment against the plaintiff upon the charge set forth in the declaration, that is a circumstance bearing upon the question of probable cause proper to be considered by the jury.' "

The real question involved is whether the defendant had probable cause to justify him in his prosecution of the plaintiff for perjury. "Probable cause" is a question of law, to be determined from the facts proven, and is defined, in the case of *Final v. Core*, 18 W. Va. 2, to be "a state of facts actually existing known to the prosecutor personally, or by information derived from others," "which, in the judgment of the court, would lead a reasonable man of ordinary caution, acting conscientiously upon these facts, to believe the party guilty." The proof of want of probable cause is with the plaintiff, but any evidence sufficient to raise a *prima facie* case is all that is required to overcome the weak presumption of its existence, and to cast the burden of proof on the defendant. In the case of *Vinal v. Core*, *supra*, it was held in the sixteenth point of the syllabus that "the discharge by a justice of the plaintiff who has been arrested and brought before him for examination, or the refusal of the grand jury to

indict him, is *prima facie* evidence of a want of probable cause, but it is liable to be rebutted by proof." The reason given for this rule in Judge Green's opinion is, in effect, that the only question presented to either the justice or the grand jury is whether there is probable cause of the guilt of the accused, and a discharge of the accused is a negative determination of this question in his favor sufficient to raise a presumption of its non-existence. And the converse of the proposition has also been held, that the refusal to discharge raises the presumption that probable cause does exist. *Maddox v. Jackson*, 4 Munf. 462; *Grant v. Deuel*, 38 Am. Dec. 228; *Womack v. Circle*, 29 Gratt. 192. And it has also been held that where, on examination, the justice commits, and the grand jury fail to find an indictment, the action of one merely off-sets, neutralizes or destroys the other, so as to render both or either of them valueless to establish a *prima facie* case either for or against the plaintiff, and thus leaves the want of probable cause to be established by other testimony. *Miller v. Railway Co.*, 41 Fed. 898. It has also been held that the waiver by the accused of a preliminary examination was *prima facie* evidence of probable cause. *Vansickle v. Brown*, 68 Mo. 627.

In determining whether the prosecution was founded on probable cause, the existing state of facts must be viewed from the standpoint of the prosecutor, and not from that of the accused. For this reason trial and acquittal do not raise the presumption of the want of probable cause. *Griffin v. Chubb*, 7 Tex. 603; *Griffis v. Sellars*, 2 Dev. & B. 492; *Bitting v. Ten Eyck*, 82 Ind. 421; *Heldt v. Webster*, 60 Tex. 207; *Williams v. Van Meter*, 8 Mo. 339; *Stone v. Crocker*, 24 Pick. 81; *Thompson v. Rubber Co.* (Conn.) 16 Atl. 554

Verdict of acquittal may be given notwithstanding probable cause, because there is not proof of guilt beyond a reasonable doubt. But the magistrate and grand jury have the very question of probable cause to try, and the evidence on the part of the prosecution is alone examined, and the proceeding is entirely *ex parte*, at least so far as the grand jury is concerned. In Wharton's Criminal Pleading and Practice (section 360) the law is stated to be: "The question before

the grand jury being whether a bill is to be found, the general rule is that they should hear no other evidence but that adduced by the prosecution." And in section 362, quoting from McKean, C. J., of Pennsylvania: "It is the duty of the grand jury to inquire into the nature and probable ground of the charge; but it is the exclusive province of the petit jury to hear and determine, with the assistance and under the direction of the court, upon points of law, whether the defendant is or is not guilty on the whole evidence for and against him. You will therefore readily perceive that, if you examine the witnesses on both sides you do not confine your consideration to the probable grounds of charge, but engage completely in the trial of the cause; and your return must consequently be tantamount to a verdict of acquittal or condemnation." Therefore, if the grand jury, by reason of misconduct or procurement of any one, hears the evidence both against and for the accused, their examination ceases to be confined to the question of probable cause, and their return, as quoted above, is "tantamount to a verdict of acquittal or condemnation," and, in case of acquittal, should not be held to be *prima facie* evidence of want of probable cause. Such is the rule in California, where the accused is permitted to appear before the grand jury with his witnesses. *Ganea v. Railroad Co.*, 51 Cal. 140. So it might be said of the examination before the magistrate, who hears all the evidence both against and for the accused, and determines from the whole evidence whether probable cause exists. To hold that a discharge by him is *prima facie* evidence of the want of probable cause is to contravene the other rule, which is just as binding, that, in determining whether the prosecution was sustained by probable cause, the facts must be examined from the standpoint of the prosecutor at the time of the institution of the prosecution. A magistrate might well say, after hearing all the evidence, that there was not sufficient cause to hold the accused, while the facts known to the prosecutor, unexplained, might be amply sufficient to convict the accused beyond even a reasonable doubt. For instance, a man's property is stolen. It is found in the possession of another party, who refuses to it give up or tell where

he obtained it. He is arrested, and, on examination, proves that he came by it from a third party honestly. The magistrate discharges him, as he can do nothing else. Now, should this discharge be held to be *prima facie* evidence of want of probable cause?

The rule laid down in the case of *Vinal v. Core, supra*, is entirely too broad to fit all cases, and must, therefore, be regarded as a general rule, subject to exception and modification. Where the accused, on the other hand, has the opportunity of introducing his evidence before the magistrate, and of being fully heard, and he waives an examination, this undoubtedly raises a *prima facie* case of probable cause; for the presumption at once rises that a reasonably prudent man, accused of a crime, who was in a condition to show that the accusation was without probable cause, rather than rest under an unjust suspicion, would gladly seize the very first opportunity that presented itself to establish his innocence. His failure to do so is a matter of his own choosing, and for the unfavorable presumption cast upon him he has no one to blame but himself. If, in so doing, he acts with the malicious intention of increasing his own hardships, expenses and difficulties, for the purpose of enhancing any prospective damages he may seek to recover from his accuser, he ought not to be permitted to accomplish his purpose, but his damages should be limited to the unavoidable results of the prosecution. *King v. Colvin*, 11 R. I. 582.

It has been well said that "actions for malicious prosecutions are regarded by the law with jealousy. Lord Holt said, a hundred and fifty years ago, that they 'ought not to be favored, but managed with great caution.' Their tendency is to discourage prosecution for crimes, as they expose the prosecutors to civil suits. And the love of justice may not always be strong enough to induce individuals to commence prosecutions when, if they fail, they may be subjected to expense of litigation, if they be not mulcted in damages." This action should therefore "be carefully guarded, and its true principles strictly adhered to, that it may not, on the one hand, impede the free course of public justice, nor, on the

other, suffer malicious and causeless prosecutions to escape its grasp." *Stone v. Crocker*, 24 Pick. 83.

By these principles this case must be determined. The first instruction asked by the defendant was properly refused by the court, for the reason that it assumes as a fact the very matter in issue, to wit, that the statement made by the plaintiff before the justice was false. Plaintiff did not deny that he made the statement, but he did deny its falsity.

The fourth instruction is also bad, in that it negatives itself, and was therefore properly refused. It tells the jury, "if they believe from the evidence there was probable cause sufficient to warrant the justice in holding the plaintiff to answer an indictment, then it is immaterial whether or not there was evidence sufficient to warrant the grand jury in finding such indictment;" which, under the law, is equivalent to saying: "If there was probable cause, it is immaterial whether there was probable cause or not," for the same evidence that would warrant the justice in holding the plaintiff would warrant the grand jury in finding an indictment.

The defendant's eighth instruction tells the jury that if they believe from the evidence that the plaintiff had witnesses sent before the grand jury to prevent an indictment, this circumstance should be considered by them upon the question of probable cause. Under the law as heretofore stated, the fact that the plaintiff had witnesses before the grand jury to prevent the finding of an indictment destroyed such finding as *prima facie* evidence of want of probable cause as against the prosecutor, and an instruction to this effect, if asked, should have been given; and therefore the instruction under consideration was improper, for the reason that the fact that the plaintiff had his witnesses before the grand jury could have no bearing on the state of facts existing at the time the prosecution was commenced.

The second instruction asked by the defendant, to the effect that plaintiff's waiver of examination before the justice was *prima facie* evidence of probable cause at least, propounds the law correctly, and should have been given. On no other reasonable theory can plaintiff's waiver be accounted for than that he believed the evidence against him would

be sufficient to justify the justice in holding him to answer an indictment; and, while the presumption arising may not be held to be conclusive, it is at least *prima facie* correct, and if not rebutted or explained, would be conclusive.

The three instructions, Nos. 4, 7 and 8, given for the plaintiff over the objection of the defendant, are all founded on the finding of the grand jury; and as it is admitted that plaintiff had his witnesses sent before the grand jury, and by their testimony prevented, as must have necessarily been the case, the finding of an indictment against himself, and acquittal as to the accusation against him, he is precluded by his own conduct from relying on such acquittal as *prima facie* evidence of the want of probable cause, as the state of facts, testified to and explained by plaintiff's witnesses could not have been otherwise than materially different from the state of facts existing and unexplained and known to the defendant at the institution of the criminal proceedings. If not, why did the plaintiff have his witnesses before the grand jury?

For the foregoing reasons the judgment is reversed, the verdict of the jury set aside, and a new trial awarded.

NOTE BY HOLT, PRESIDENT:

I do not think the Circuit Court erred in refusing to instruct the jury that "the waiving of a preliminary examination by the plaintiff, when charged with crime, was *prima facie* evidence that there was at least probable cause sufficient to justify the defendant in making the complaint."

1. Now, when the modern tendency is to cut loose from artificial rules of evidence already created, as hampering the due administration of justice, I can see no good reason why we should overrule the circuit judges, who have daily experience of these evils, for refusing to create or apply new ones. "These artificial presumptions have no other effect than to disturb and obscure the judgment of juries in dealing with the evidence. Instead of dealing with the evidence in the natural way, according to their conscience and experience, and deciding according to common sense, they are told

to go according to some artificial rule of evidence which they understand but dimly, if at all, and may be thus induced to decide wrongly." See 1 Thomp. Torts 9.

2. The only case cited for it is *Vansickle v. Brown* (1878) 68 Mo. 627, 637. When we turn to the case we find that Henry, Judge, dissented, and Hugh, Judge, in delivering the opinion of the court, says: "If the finding of the magistrate on the facts proved before him makes a *prima facie* case, such waiving an examination, and voluntary entering into a recognizance, amounts to a confessing by the accused that there is probable cause"—citing *State v. Railey*, below. To us it is a clear case of *non sequitur*, and, on turning to the case referred to (*State v. Railey* [1864] 35 Mo. 168) we find that the docket of the justice is as follows: "*State of Missouri v. Lewis C. Railey* The defendant appeared before me, and waived an examination, and admitted that he did shoot H. E. W. McDearman on the 11th day of May, 1861, with intent to kill, and entered into bonds, etc. And Judge Bates, delivering the opinion on this point, says: "The justice's docket, though not showing an adjudication by the justice, shows an actual admission of the defendant that the crime had been committed, and not merely that there was probable cause to believe him guilty of it, but a direct and unequivocal admission of his guilt." On the other hand, in *Schoonover v. Myers* (1862) 28 Ill. 308, it was held, in effect, that such waiver was not an admission of probable cause. It might be well enough said that as the examining magistrate hears evidence and inquires into the facts and circumstances, and is presumed to be a fair minded man of common sense, when he reaches the conclusion that the offense has been committed, and there is probable cause to believe the accused to be guilty, and he sends the party on, such finding is, at least, *prima facie* evidence thereof. Here the presumption is not artificial, but it by no means follows that because the accused waives an examination, such waiver has the same significance. The magistrate makes no examination; hears no evidence; decides nothing except the sufficiency of the recognizance. The accused admits nothing; certainly he does not suppose himself to admit that there is probable cause for making the charge, when

he knows that it is without the slightest foundation, but is the result of the promptings of the malice or avarice of some secret, false, or open enemy to get possession of the thing in controversy; to force the payment of a false claim; to ward off a suit of prosecution, or for some other private end or sinister motive of personal hate or personal gain. And to have this artificial *non sequitur* forced upon him may be doing him great injustice in so important a matter; and, although he is not likely to sue, he does not wish to rest under such an imputation.

3. The plaintiff opens his case weighted with the burden of making the negative proof that the charge was made without reasonable probable cause. Is not that enough? Is he, in addition, to be handicapped with an unnatural inference, drawn by an artificial rule of evidence from conduct that can be reasonably explained and accounted for in other ways? He wishes to expose some blackmailer; to avoid the charge of buying off his accuser; to show clearly that the charge is wantonly made for some sinister motive of personal gain; he wishes to have himself vindicated by the action of the grand jury or court, or to have the matter practically ended once for all; he acts under the advice of counsel, and for some one or many reasons, which imply no guilt, does not wish at that stage to expose his hand. Such artificial inference, drawn from waiver, has no analogy to preliminary examination and commitment. To give it the same effect is not in accord with the general mode of regarding it. The rule is not called for by public policy or general convenience. It subserves no useful purpose in the administration of justice. Waiver is a circumstance in its own peculiar case; nothing more. To give it weight and efficiency as proof, which it does not have in and of itself, is certain to bewilder in some degree those whose course ought to be made practically plain, and is likely to mislead those who are expecting to be guided aright, as far as they are guided at all.

CHARLESTON.

CLARK *et al.* *v.* PERDUE.

Submitted January 19, 1895—Decided March 30, 1895.

1. EVIDENCE—COPY OF DEED.

An office copy of a deed improperly admitted to record is not competent evidence.

2. EVIDENCE—EJECTMENT—POSSESSION—FORMER RECOVERY.

Where an action of ejectment is brought by an adverse claimant against a tenant to recover possession of the premises, and judgment is rendered for such plaintiff against the tenant by default, and a writ of possession is executed by which the plaintiff is placed in actual possession, the possession is thereby changed, and the landlord is thereby actually turned out—in a second action of ejectment by plaintiffs, who derive title from the plaintiff in the first suit, against such landlord, sued as defendant, the record of the recovery in the former suit is competent evidence on behalf of the plaintiffs in the latter suit as showing or tending to show that the defendant's possession at that time was ended and changed by the execution of such writ of possession.

J. S. CLARK and A. W. REYNOLDS for plaintiffs in error, cited 32 Gratt. 107, 113; 27 W. Va. 762; 11 Gratt. 172; 1 Gratt. 211; 26 W. Va. 370; 54 Pa. 284; 105 Pa. 47; 144 Pa. 613; 160 Pa. 483, 492; 162 Pa. 114.

OKEY JOHNSON and A. C. DAVIDSON for defendant in error, cited 27 W. Va. 762; 11 Gratt. 172; 4 Munf. 382; 6 Munf. 433; Code 1868, c. 90, s. 35.

HOLT, PRESIDENT:

This is an action of ejectment brought in the Circuit Court of Mercer county on the 12th day of March, 1890, in which there was a trial on plea of not guilty, and verdict for defendant, Perdue; motion by plaintiffs to set the same aside and award a new trial overruled, and final judgment for defendant on the 15th day of January, 1892, to which this writ of error was allowed.

The plaintiffs assigned as grounds for new trial seven rulings made by the court during the progress of the trial, which they claimed to be erroneous, and to their prejudice. Two of these grounds are relied upon in argument here: "*First*. In the course of the trial the plaintiffs offered in evidence the record, including the judgment, writ of possession, and return endorsed thereon, in the action of ejectment of *W. H. Witten v. Silas Perdue et al.*, in connection with the testimony of R. C. Christie, clerk of the Circuit Court, and of W. H. Witten.

"*Second*. Plaintiffs also offered in evidence as a part of their claim of title and as color of title a certain deed from James Hector to Obadiah Belcher, and a deed from Obadiah Belcher to Chrispianos Belcher. The court refused to allow the record and the two deeds to be read in evidence to the jury, and plaintiffs excepted."

The plaintiff in an action of ejectment must recover on the strength of his own title, and the defendant is not called upon to give up the possession to any one who does not show himself to be the legal owner, unless he is in possession under the plaintiff's title, or has entered upon and ousted the plaintiff without title or authority.

The commonwealth being the fountain head from which ownership of land is mediately or immediately derived, the plaintiff generally begins by tracing back his title to the land in controversy to that source; and land in a state of nature of which no actual possession has been had he can, in general, recover in no other way. But where the land has been held in actual possession by himself, or by some predecessor under whom he claims, long enough to make the title good by adversary possession, he may show himself entitled to recover without being able to connect himself with the commonwealth. The order in which he introduces his claim of paper title is a matter generally left to his own convenience, and, although he may not be able to trace the legal title back from himself to the commonwealth by reason of the defective acknowledgment of some deed, or from any other cause, he is permitted nevertheless to go back as far as he can—in fact to introduce any and all the paper

titles he may have to the land in controversy—for the purpose of showing the nature of his claim, and the commencement and extent of his possession.

The first deed offered by plaintiffs and ruled out by the Circuit Court is a copy of a deed from James Hector to Robert Belcher, dated the 11th day of May, 1842, purporting to sell and convey a certain boundary of land supposed to contain one thousand five hundred acres, signed, sealed and delivered in the presence of three witnesses; but it was proved before the clerk by but two of the witnesses, whereas, as the law then was, it was necessary to be proved before the clerk or court by the three witnesses before it could be properly admitted to record. See 1 Rev. Code 1819, p. 362. §§ 1-6. The deed, therefore, not having been duly admitted to record, a copy from such record was not competent evidence. The second copy of a deed excluded by the court was of a deed made by James Hector to Obadiah Belcher, dated the 11th day of May, 1842, for two thousand five hundred acres, executed in the presence of three witnesses, but admitted to record on the 11th day of July, 1845, after being proved before the clerk of the County Court of Mercer county by the oaths of but two of them. Such copy was properly rejected as incompetent evidence for the same reason as the first, there being no law authorizing it to be admitted to record on proof by less than three witnesses. The Code of 1849, taking effect on the first day of July, 1850, was the first statute to reduce the number to two. See Code, 1849 (Ed. 1860) p. 569, c. 121, s. 2. The next paper offered in evidence by plaintiffs was an office copy of a deed dated May 12, 1842, from Obadiah Belcher to Chrispianos Belcher for one thousand five hundred acres, admitted to record on the 9th day of February, 1846, on proof before the clerk by but two of the three subscribing witnesses, which was also properly ruled out for the same reason. And, even if competent, there is nothing to show that they were relevant, for there is nothing on their face showing that they covered in whole or in part, the land in controversy; nor was any such proof offered, nor any statement made that plaintiffs expected to follow them up with any such evidence.

Did the court err in ruling out the record of recovery in ejectment of *Witten v. Silas Perdue et al.* had by judgment entered on the 5th day of May, 1873? That recovery by William H. Witten of Silas Perdue embraced the land in controversy. It was followed by a writ of possession, issued on the 19th day of May, 1873, which was executed on the 12th day of July, 1873, by the deputy sheriff of Mercer county, placing the plaintiff, William H. Witten, in possession of the land. There was evidence tending to show that when that suit was brought by filing the declaration and proof of the service of notice on defendant Obadiah Belcher on the 27th day of January, 1873, and on defendant Silas Perdue on the 28th day of January, 1873, Silas Perdue was in actual possession of the premises as tenant of George W. Perdue, the defendant here; and that George W. Perdue had actual notice of the bringing of that suit against his tenant. Defendant George W. Perdue claimed under a deed from Zachariah Perdue to him for fifty acres, dated 25th March, 1868, being part of a junior grant to Zachariah for four hundred and fifty acres, dated 31st day of May, 1849; and his claim was, and his own evidence tended to show, that under this deed for fifty acres he took actual possession of the land in controversy in 1868, and so held the same continuously until this suit was brought. There is certainly one ground upon which this record was relevant, and admissible in evidence: 1. It tended to show that defendant George W. Perdue had not had continuous, uninterrupted possession of the land since 1868; and (2) it, with the accompanying evidence, tended to show that there had been a judgment against him in favor of Witten, under whom these plaintiffs claim. Whether it is conclusive against him as to such title and right of possession may admit of grave doubt. Our statute on the action of ejectment (chapter 90, Codes 1868, 1891) abolishes the writ of right, and molds into the one action called "ejectment," simple and comprehensive, all the substantial provisions of former law, with such improvements as were found to be proper to disentangle justice from nets of form, preserve all the benefits of the writ of right and of the action of ejectment, as well as of all other actions, posses-

sory and droitual, and is also made comprehensive enough to try the mere right to real property, as well as the right of possession, and to determine it finally, being substantially a writ of right as much as an action of ejectment. See Report of Revisors of Code 1849, p. 691, note. Such statutory remedy prevails now pretty much everywhere throughout common-law countries, and, except where a second trial is given, is a conclusive and final determination as to the title or right of possession established in such action upon the party against whom it is rendered, and against all persons claiming from, through, or under such party by title accruing after the commencement of such action, except as thereafter mentioned (see section 35, chapter 90, Code); and such conclusiveness and finality applies as much to a judgment by default as to one rendered on verdict found on issue joined, for section 12, chapter 90, says: "And if the defendant fail so to appear and plead, his default shall be entered and judgment given against him." Section 5, chapter 90, prescribes that "the person actually occupying the premises shall be named defendant in the declaration." If they be not occupied, the action must be against some person exercising acts of ownership thereon, or claiming title thereto, or some interest therein, at the commencement of the suit. If the lessee be made defendant at the suit of a party claiming against the title of his landlord, such landlord may appear, and be made a defendant with, or in the place of, his lessee. It is conceded that the action of ejectment of 1873 was governed by the law as it was under the Code of 1868, and it was held under the law as it then was (prior to the act of 1877) that the action could be brought only against the party in possession when the premises were occupied. *Johnston v. Mann*, 21 W. Va. 15. It was optional with the landlord, George W. Perdue, whether he would appear or not. The plaintiff could not make him a defendant, as the premises were then occupied by his tenant, Silas Perdue, as the plaintiffs in this suit claim, and as their evidence tends to prove; for the term, "actually occupying the premises," as used in the statute, is not confined to one who has his home and dwelling place upon the premises, but embraces one who

is in actual possession by the ordinary, continuing acts of ownership which has produced a change in their condition, giving them the appearance of being used. So the term is used in the cases of *Taylor v. Burnside*, 1 Gratt. 165; *Overton v. Darisson*, *Id.* 211. And such actual possession once taken and held by fencing a field and cultivating crops is presumed to continue until the contrary appears; throughout the winter season—the month of January, for example, as in this case—although no visible use may then be made of the premises other than the fact of having it inclosed or fenced in. These plaintiffs claim by title regularly derived from William H. Witten by conveyances made since his recovery of the land in controversy by the judgment rendered on default against Silas Perdue in 1873. In that action of ejectment William H. Witten complained and averred that on the 1st day of January, 1873, he was seised and possessed in fee simple of a certain tract of land, giving the metes and bounds, which includes the land here and now in controversy; and, being so seised and possessed, the defendants Obadiah Belcher and Silas Perdue afterwards to wit, on the day and year aforesaid, entered upon said premises, and unlawfully withheld the said premises from the said plaintiff. The plea of not guilty would have put these facts in issue, and would have put plaintiff to the proof of such right to the possession of the premises at the time of the commencement of the suit, and such proof would have been necessary to uphold and justify such verdict and judgment. And the judgment by default against Silas Perdue was attended by the same legal consequences of conclusiveness as if there had been a verdict for the plaintiff (see 1 Freem. Judgm. § 330) for such is the language of our statute. It makes no distinction. See *Green v. Hamilton*, 16 Md. 317; 77 Am. Dec. 295, notes. George W. Perdue being the landlord, was the real party in interest, who could not, as the law then was, have been made a defendant, who would, however, have been the real party benefitted had there been a defense and judgment in favor of his tenant, or had he made himself a defendant, and obtained such judgment. Such a one, having an opportunity to make defense, and standing by and letting judgment against his

tenant go by default, would, under our then statute. seem to be as much bound and concluded as his tenant in possession (there being no fraud or collusion which vitiates such judgments) for the plaintiff could not make him a defendant. but he could enter himself as such, and make defense, if he saw fit. But the law has been changed, and now permits the plaintiff to make the landlord a co-defendant. See section 5, chapter 90, Code (Ed. 1891) p. 699.

Can it be said that this record is *res inter alios acta*, when the law did not permit the plaintiffs to make him a defendant, but did give the landlord such right, and the notice of the suit gave him the opportunity to controvert the plaintiffs' claim, and resist their demand? Still such a judgment by default against the tenant is so obviously dangerous, as being exceptionally open to the temptation of abuse with serious consequences, that if it were necessary to decide it, I should, as now advised, be reluctant to hold the landlord to have been a party to such first suit, within the meaning of the term as used in the statute, as this could only be done by construing the term "party," as used in section 35 of chapter 90, to comprehend the party in interest, and that the landlord in this case was a party by representation. But, without giving it a conclusive effect, there are other grounds upon which the competency of the excluded record can be safely rested, and among them the one first noted, viz.: that it proves Witten's possession and defendant George W. Perdue's want of possession in 1873, when the writ of possession was executed. See 2 Herm. Estop. p. 224, citing *Clarkson v. Stanchfield*, 57 Mo. 573; *Mitchell v. Davis*, 23 Cal. 381; *Chirac v. Reinicker*, 11 Wheat. 280; *Jackson v. Hill*, 8 Cow. 294.

The evidence tends to prove that Silas Perdue was the tenant of George W. Perdue; and the judgment and writ of possession executed against Silas, putting the plaintiff Witten, who claimed in fee simple for himself, into possession, at least had the effect of interrupting and changing the character of the possession; and such record, as already stated, was to that extent and for that purpose relevant and material. See 2 Black. Judgm. § 577, citing *Striddle v. Saroni*,

21 Wis. 175; *Read v. Allen*, 58 Tex. 380; *Chant v. Reynolds*, 49 Cal. 213; *Read v. Allen*, 56 Tex. 176.

The pleadings in ejectment are broad and indefinite. They contain no recital of title. The plaintiffs' chain of title shows that they claim under Witten, the plaintiff in the former action; and it is competent to show by parol that Silas Perdue claimed as tenant, and was in possession under George W. Perdue, at the time of Witten's recovery against Silas, for in no other way than by such parol helping evidence can the judgment be applied to its proper subject-matter, or what was decided be ascertained, and given its true legal effect, if any, between the parties to this suit.

For the reason given, I am of opinion that the record in the action of ejectment of *Witten v. Silas Perdue* and the evidence of the witness Witten were improperly excluded, to the prejudice of the plaintiffs. Therefore the judgment complained of must be set aside, and a new trial be awarded.

CHARLESTON.

GREENBRIER INDUSTRIAL EXPOSITION v. SQUIRES.

Submitted January 23, 1895—Decided March 30, 1895.

CORPORATIONS—ESTOPPEL—PAYMENT OF STOCK SUBSCRIPTION.

A party who takes part in the meeting of stockholders for the organization of a corporation under chapter fifty four of the Code, and votes therein as a stockholder for directors, and, when called upon by order of the directors, pays an assessment on his stock, can not deny the existence of the corporation when sued for his stock, and is liable therefor.

ALEX' R F. MATHEWS for plaintiff in error, cited 37 W. Va. 738; 1 Cook Stock, S. & Corp. Law, § 186, note 1; 6 S. E. Rep. 360; 37 W. Va. 753; 1 Cook Stock. S. & Corp. Law, § 97, note 12.

JOHN W. HARRIS for defendant in error, cited 1 Mor. Corp. § 74; 1 Cook. Stock S. & Corp. Law, § 52; 37 W. Va. 738;

88 Mich. 386; 40 Ill. 303; 54 Md. 161; 1 Cook Stocks S. & Corp. Law, p. 96 n.; 36 N. H. 545; 1 Mor. Corp. § 63; 1 Cook Stock S. & Corp. Law, p. 166; Id. § 55; 1 Mor. Corp. § 75; 21 W. Va. 172; 41 Me. 512; 21 Atl. 540.

BRANNON, JUDGE:

The Greenbrier Industrial Exposition, as a corporation, obtained a judgment in the Circuit Court of Greenbrier county against L. W. Squires, based on a subscription by him to its capital stock, and Squires obtained this writ of error.

Squires depends on the theory that there never was a legal corporation as to him, and that the subscription which he made to its stock is not binding. The formation of this alleged corporation was under chapter fifty four of the Code. The preliminary agreement constituting the first step and basis in the process of formation of the corporation was signed by Squires, but not acknowledged by him. The certificate of incorporation issued colorably under it. By the agreement the proposed corporation was to expire December 1, 1910, while the certificate of incorporation fixes the date of its expiration December 1, 1919. By reason of non-acknowledgment of agreement and variance between it and the certificate of incorporation, Squires would not be liable for his subscription made by said preliminary agreement, had he done nothing more, as this Court decided in *Industrial Exposition v. Rodes*, 37 W. Va. 738 (17 S. E. Rep. 305.) That statutory requirements as to preliminary steps in the organization of a corporation, to bind signers of the agreement, must be complied with, I refer to 1 Lawson, Rights, Rem. & Prac. §§ 436, 437; *Childs v. Smith*, 55 Barb. 45. The case of *Real Estate Co. v. Tower*, 161 Mass. 10 (36 N. E. Rep. 680) holds the right of one signing preliminary articles to withdraw before organization, and is a full discussion of how he may withdraw. See *Tavern Co. v. Burkhard*, 87 Mich. 182 (49 N. W. Rep. 562). This case, however, differs from the *Rodes Case* in its facts. Rodes did not acknowledge the agreement, though he signed it, and took no part in the organization of the company, did nothing but sign the agreement. Squires

signed the agreement, and, though he did not acknowledge it, he attended the organization meeting held by stockholders on 25th November, 1890, after the issue of the certificate, and voted as a stockholder for the directors then elected, and when, after the directors had made a call for the payment of ten *per cent.* on the stock, payment of the assessment was asked of him, he paid twenty dollars, the ten *per cent.* on his two shares of stock, and an account was opened on the books of the corporation, charging him with two shares of stock, and crediting him with the twenty dollars. In June, 1891, after further calls had been made upon stockholders, the assistant secretary addressed an official letter to Squires, informing him of the action of the directors incurring cost in the erection of buildings and race course, and asking payment of Squires' assessments, to which he wrote a reply, dated July 24, 1891, stating that his understanding was that he was only taking one hundred dollars of stock, and was only to pay fifty dollars, and that if that suited the directors, it was all right, and if not, he wished his money returned, and he would not pay the amount demanded. Thus he recognized the directory of the corporation, and that he had subscribed stock, and on a certain basis would pay as a stockholder, differing only as to amount of subscription, a matter outside of the question of his character as stockholder, and governed by the evidence bearing on it, the agreement. In the *Case of Rodes, supra*, it is stated incidentally—not as a point necessary to the decision in the case—that as to subscribers before the issue of the charter, those becoming so by executing the agreement preliminary, if they acquiesced in the mode of incorporation by subsequent acts by payment of installments, or otherwise treat it as a corporation, they can not set up that the corporation was not legally incorporated. I have taken pains, by examination of authorities cited and some others, to ascertain whether this position is correct, and I find it so. I find it laid down in the very recent work (1 Thomp. Corp. § 528) which, judging from the two volumes now out, will prove an invaluable work on that all-important subject. In *Rikoof v. Machine Co.*, 68 Ind. 388, it was held that payment of part of

stock upon assessment and promise to pay balance, "involved a clear admission of the full and complete organization of the corporation, and of the existence of every fact necessary to such organization." *Railroad Co. v. Borsner*, 48 Pa. St. 29, held that when, after subscription of stock under an act requiring a certain amount before incorporation, a later act lessened it, the change would not release the subscriber who voted at the organization and in the election of directors in right of his subscription. In *Bell's Appeal*, 115 Pa. St. 88 (8 Atl. 177) it was held that one who subscribed in view of and for purposes of organization, and paid part of the stock, was estopped from denying his liability. In the Supreme Court of Missouri, in *Hotel Co. v. Hunt*, 57 Mo. 126, the opinion says it is well settled that a defect in the certificate is not available to a stockholder, who, by his conduct, has waived the defect. The court also said: "The cases in regard to this point have all been examined, and they all agree that, where the subscription has been acquiesced in, either by payment of part of the subscription, or by becoming a director, or by attending meetings of stockholders, or by any other act indicating an acquiescence in the validity of his subscription, his defense, based on mere technical objections, will be disregarded. But the present case is peculiar, in that it shows nothing but the bare act of subscribing. * * * It appears that the ten *per cent.* required by the articles of association to be paid on subscription was never paid; that the defendant never took any part in the company's acts, except to subscribe." The Alabama court says: "A subscriber to stock may, like any other person, be estopped from disputing the *de facto* existence of a corporation, especially as against creditors, where he attends meetings of stockholders, or otherwise participates in the business of the company, thereby inducing others to act upon the faith of his admissions, to their prejudice." *Schloss v. Trade Co.*, 87 Ala. 414 (6 South. 360). In *Bridge Co. v. Chapin*, 6 Cush. 50, it is admitted that if a subscriber, knowing the whole capital had not been subscribed, but attended meetings, and participated in the business of the company, he would be estopped to deny his subscription. In *Association v. Walker*, 83

Mich. 386 (47 N. W. Rep. 338) attending meeting and voting stock was held to be a waiver of objection to an increase of stock. Presence of a party at organization of a company as a corporation, his election as president, and signature as such to a note is, in effect, an admission of the existence of the corporation, and that he was a stockholder. *Haynes v. Brown*, 36 N. H. 545. Payment of calls is an admission that subscription is binding. *Boggs v. Olcott*, 40 Ill. 304; *Musgrave v. Morrison*, 54 Md. 161. Such acts waive irregularity of subscription. *Railroad Co. v. McPherson*, 86 Am. Dec. 128 and note.

It is contended that a corporation was formed, but not the corporation contemplated. It is the same name, different only as to date of expiration from the agreement. We can not say this makes it another corporation. It is the same in all other aspects. "Even where articles of association are altered, or an attempt is made to transfer a subscription to a new company, the subscriber will be liable if he consented to the change, either by word or act indicating acquiescence." *Hammond v. Straus*, 53 Md. 1, 16; 1 Mor. Priv. Corp. § 63. "If any question could arise as to the identity of the corporation organized as the one mentioned in the subscription paper, it must be held to have been waived by the defendant when he appeared at its meetings, and took part in the discussion of questions there raised, and voted his stock." Opinion in *Association v. Walker*, 83 Mich. 393 (47 N. W. Rep. 338). There is not a shadow of evidence that any other corporation of anything like the same name existed, and it seems to me that it is utterly impossible to say that Squires, in his acts of participation, in fact meant any other, or that the law would say they are not referable solely to the corporation contemplated by the agreement which he signed. It was the same. The mere variance above spoken of between agreement and certificate did not, for the purpose of the question now spoken of, make it another company; it did not change identity. The frame, the business, the nature of the corporation made by the certificate are the same as those of the one contemplated by the article, so that Squires' acquiescence or waiver would surely apply to the corporation made

by the certificate. Where, even, there is a material departure from the original plan, the cases agree that action such as that of the subscriber in this case will bind him. Note in *Machine Co. v. Davis* (Minn.) 26 Am. & Eng. Corp. Cas. 69 (41 N. W. Rep. 1026). The case of *Manufacturing Co. v. Hockaday*, 89 Va. 557 (16 S. E. Rep. 877) while holding that a material change in the purposes of a corporation will release a stockholder, admits in the opinion that attendance on meetings, or paying subscriptions, is a waiver of the objection. The rule of release, meet it where you will, is always stated with this qualification. *Railroad Co. v. Wilson*, 22 Conn. 435, is strong to same point. See, on this estoppel subject, *Glass Co. v. Alexander*, 9 Am. Dec. 102.

But it is argued that when Squires did the acts of acquiescence he did not know of the variance. The certificate of incorporation was read aloud at the organization. He says he did not hear it read. No one was charged with the duty to inform him of it. It was his own duty to look to that, and means were open. In *Railroad Co. v. Bowser*, 48 Pa. St. 29, it was argued as here, that to bind the subscriber by acquiescence he must know of the change. An instruction to the jury that if he did not know of it, he was not bound, was held erroneous. The opinion said that after the act of the legislature reduced the capital, "the company was organized, and the defendant voted in right of his subscription at the organization and at the election of directors Upon this state of facts the court instructed the jury that unless the defendant knew when he voted that the required subscription to the capital stock had been reduced by law from one hundred and fifty thousand dollars to twenty five thousand dollars, the change released him from his subscription; that the presumption of law would be that he knew of the change in the charter, but that whether he did or not the jury should determine. In this, we think, there was error. By voting, the defendant admitted himself still a corporator, and the general principle of law is that a corporator must be held cognizant of his own charter. There was no evidence to rebut this legal presumption, even if it was capable of rebut-

tal. * * * The change in the charter could not relieve the defendant. After it was made he had contributed to involve his co-corporators in the venture, encouraged the creation of debts, and it was no longer for him to deny his liability to pay his own subscription."

We affirm the judgment.

CHARLESTON.

HALE v. TOWN OF WESTON.

Submitted January 29, 1895—Decided March 30, 1895.

1. MUNICIPAL CORPORATIONS—DAMAGES—STREET.

Under section fifty three of chapter forty three of the Code, any person who sustains a direct injury to his person or property—for instance, having a limb broken or a horse disabled—by reason of a street in a town being out of repair, may recover damages for such injury by an appropriate action, in a court of competent jurisdiction, against said town.

2. MUNICIPAL CORPORATIONS—DAMAGES—STREETS.

One who suffers an injury only in his business from a street being out of repair can not recover damages therefor from a city or town under section fifty three of chapter forty three of the Code.

3. MUNICIPAL CORPORATIONS—DAMAGES—STREETS.

The proprietor of a brickyard who is engaged in the manufacture of brick in the vicinity of a city or town, and in the erection of houses in said town or city, who, in common with others, is injured in his business by reason of the municipal authorities thereof failing to keep a street in repair which constitutes the highway from said town passing said brickyard, can not maintain an action for damages against said city or town for losses sustained by him in his business.

4. JURISDICTION—SPLITTING ACTION.

A person who asserts a claim to a specific amount of damages for an alleged injury sustained in his business will not be allowed to split up his claim in order to reduce it to the jurisdiction of a justice, and to bring consecutive suits before a justice for such claim.

A. EDMISTON and W. W. BRANNON for plaintiff in error:

40	313
41	186

40	313
46	424

40	313
49	186

40	313
61	403

40	313
63	581

In an action for damages the plaintiff can not manufacture a jurisdiction before a justice by splitting up his demand.—

Const. of W. Va. Art. VIII, s. 28; Code of W. Va. c. 50, s. 8; 33 W. Va. 88; Sedg. on Dam. (8 Ed.) vol. 1, § 84; 33 W. Va. 289; 2 Va. Cas. 42; 77 Va. 225; 4 Miner's Inst., part 1, 266; 15 Am. Dec. 632; Hawes on Jur. of Cts. § 10.

*In West Virginia cities and towns are not liable in civil actions for damages resulting to individuals by failure to keep roads, streets and alleys in repair.—*Code of W. Va. c. 43, s. 53; 6 W. Va. 312; 16 W. Va. 307; 23 W. Va. 14; 31 W. Va. 384; 30 W. Va. 657; 34 W. Va. 299; 2 Sher. & Redf. on Neg. (4 Ed.) § 371; Sher. & Redf. on Neg. (Ed. 1869) 136; Sedg. on Meas. of Dam. (Ed. 1847) 34; 46 Tex. 525; 17 Ill. 143.

W. B. McGARY for defendant in error:

ENGLISH, JUDGE:

This was a suit brought by P. M. Hale on the 3d day of June, 1890, before R. L. Mason, a justice for the county of Lewis, against the town of Weston, in which the plaintiff claimed and recovered three hundred dollars damages. The case was removed to the Circuit Court on *certiorari*, and was again tried in that Court, resulting in a verdict for the plaintiff, and judgment for three hundred dollars. During the trial of said action in the Circuit Court the defendant excepted to various rulings and instructions given by the court, and after the evidence for the plaintiff was all in, the defendant, by its counsel, moved the court to strike out the plaintiff's evidence, and exclude the same from the jury, which motion the court overruled, and permitted the said evidence to remain before the jury, and the defendant excepted.

The action appears to have been predicated upon the following state of facts: The plaintiff was the owner and operator of a brickyard in the vicinity of the town of Weston in the fall and winter of 1889-90, and in order to reach said brickyard from said town with fuel to be used by him in burning his brick, and to carry his brick, when ready for use, to such places as he needed them in the town, he was com-

pelled to pass over a certain street of said town, which was in bad condition, and which, although the town authorities had attempted to repair it by scraping dirt into the holes, was almost impassable, on account of the wet season which followed, and by reason of the condition of this street he was unable to haul fuel to his kiln, which was ready to burn; that the brick were injured by drawing dampness, and he was damaged thereby to the amount of one thousand dollars.

The plaintiff was asked the question whether he divided up his suits and sued for three hundred dollars at different times, and replied: "Yes, sir; I did, so I could get them tried. After suing first time, and obtaining judgment I waited, thinking the town authorities would fix up the street, and, after their failure to do so, sued again, and in like manner, after waiting a second time after judgment, sued the third time." The defendant moved to strike out the plaintiff's evidence, to set aside the verdict, and award it a new trial, because the same was not founded on sufficient evidence, because it was contrary to the law and the evidence, and because the same was contrary to the court's instructions, which motion having been overruled, the defendant excepted, and set out all the evidence offered before the jury in a bill of exceptions, and applied for and obtained this writ of error.

The first error assigned and relied upon is the refusal of the court to strike out the plaintiff's evidence. Under this assignment of error the question is presented whether or not, everything being proven in the case which the evidence tends to prove, the plaintiff is entitled to recover; in other words, does the fact that the street or road complained of during the wet season and winter of the years 1889-90, became impassable for teams, render the town of Weston, through a portion of which said highway passes liable in damages to the plaintiff, who was engaged in the manufacture and sale of brick in the locality shown by the evidence?

Under the heading "Public Wrongs," Sedg. Dam. (5th Ed.) p. 32, says: "To this general principle, that, where loss and legal injury unite, relief will be given by suit, the law recog-

nizes but one exception—that where the wrong is on so great a scale that the whole community, or a large portion of them, suffer from it. ‘Here,’ says Blackstone, ‘I must premise that the law gives no private remedy for anything but a private wrong.’ And so the law is laid down by Lord Coke in regard to nuisances on highway: ‘A man shall not have an action on the case for a nuisance done in the highway, for it is a common nuisance; and then it is not reasonable that a particular person should have the action, for, by the same reason that one person might have an action for it, by the same reason every one might have an action, and then he would be punished a hundred times for one and the same cause.’ ‘In such a case the remedy is by indictment.’ So, also, in the case of *Quincy Canal v. Newcomb*, 7 Metc. (Mass.) 276, it was said that if a party had suffered damage from the filling up of a canal, and want of cleansing, by means of which he was unable to enter it, it would have been a damage suffered in common with all other members of the community, and therefore redress must be sought by a public prosecution. Where one suffers in common with all the public, although from his proximity to the obstructed way, or otherwise, from his more frequent occasion to use it, he may suffer in a greater degree than others, still he can not have an action, because it would cause such multiplicity of suits as to be itself an intolerable evil. But where he sustains a special damage, differing in kind from that which is common to others, as where he falls into a ditch unlawfully made in a highway, and hurts his horse or sustains a personal damage, then he may bring his action.” 2 Shear. & R. Neg. § 371, states the law upon this question as follows: “He, and he only, can maintain an action for a defect in a highway who has sustained some damage peculiar to himself, his trade or calling. A private action will not lie for an injury caused by the non-repair of a highway, if all other persons passing suffer in the same kind, even though in far less degree. * * *

Thus the mere fact that one is delayed by an obstruction, and is obliged in common with every one else who attempts to use the highway, either to pursue his journey by a less direct road, or else to remove the obstruction, will not entitle

him to maintain an action for damages. And although an obstruction in a highway may make it difficult, or indeed impossible for a merchant to deliver goods at his store, or for a farmer to gather his crops, or for a landlord to rent his houses, yet if the whole neighborhood suffer damages from the same cause, similar in kind, even if less in degree, no damages are recoverable. Upon this principle, no one can recover damages for being deprived, with the rest of the community, of the use of a highway by its total obstruction, as, for example, by a great fall of snow." And in note 1 it is said: "An action can not be maintained against a town for damages alleged to have been caused to the plaintiff by the obstruction of a road by snow, by reason whereof he was prevented from traveling on the road with his cattle and teams and on foot, and from transporting his logs and timber to a saw-mill, and from otherwise working on his wood lot and about his logs and wood, and a declaration setting forth such a cause of action is bad on demurrer;" citing *Holman v. Townsend*, 13 Metc. (Mass.) 297, etc.

It is difficult to distinguish between the consequences and liability resulting from a fall of snow on a highway and the fall of rain upon a street or roadway which has been recently repaired, and the holes filled with loose dirt, as the result would be the same in both instances. A case very similar in its circumstances to the one under consideration is that of *Gold v. City of Philadelphia*, reported in 8 Atl. 386, in which it is held by the Supreme Court of Pennsylvania that "a municipal corporation charged with the duty of keeping highways in repair is not liable to the owner or occupier of property fronting thereon for a consequential loss to his business resulting from the neglect of such duty." The facts in this case as disclosed by the report of the referee, appear to have been that the plaintiff was the lessee and proprietor of an inn situated in the suburbs of the city of Philadelphia, at which farmers and drovers were in the habit of stopping, with their cattle, and sheds had been erected for their accommodation, and the patronage of the house was such that it was a source of considerable profit. The inn fronted on the road leading into the city, which road was under the

supervision of the city authorities. The road had been neglected for several years, and, as a natural result, was in bad repair; and in the fall of 1880, the city graded Gowen avenue, at Mt. Airy, some distance below the inn of the plaintiff, and, from the cuttings made necessary by that grading, obtained a quantity of red or yellow earth or loam, which was spread upon portions of the road in question, with the intention of grading it. During the winter, after this red earth was put upon the road, the condition of it was very bad; the ruts and holes, which had been allowed to grow deeper in the old roadbed, were covered and hidden from sight by the soft earth spread over them; and when the rains came, and this soft earth was converted into mud, these old holes served as pitfalls for travelers, who, by reason of the covering of the mud, were unable to see them, and the custom at the plaintiff's inn was greatly decreased by the condition of this road. One of the defenses relied on by the city was that the obligation imposed upon the city to keep the road in repair was a public duty, a neglect to perform which was punishable by indictment, and that no one was entitled to a private action for negligence against the city, unless he could show some injury peculiar to himself, and different in kind from that which was suffered by the general public. The learned judge, in concluding his opinion in this case, says: "When a duty is imposed upon a municipal corporation for the benefit of the public, no benefit or consideration is received by such municipality, as in the case of a trading corporation; hence no implication arises of liability to the individual citizen for any injury, which he has suffered in common with other citizens, resulting from a neglect of such duty. To sustain a contrary doctrine would be disastrous to municipalities, and consequently to the general public. If we once throw open the door to a recovery in such cases, how are we to measure the extent to which a public highway may be out of repair, in order to entitle owners of property abutting thereon to recover damages? Such questions would have to be referred to a jury, whose standard of duty would be as shifting as their verdicts would be uncertain, and in many instances oppressive." Mr. Bigelow, in his note to *Rose v.*

Miles (Lead. Cas. Torts 471) states the general principle thus: "If, then, the right invaded or impaired is a common or public one, which every subject of the state may exercise and enjoy, such as the use of a highway or canal, or a public landing place or a common watering place upon a stream, in all such cases a mere deprivation or obstruction of the use, which excludes or hinders all persons alike from the enjoyment of the common right, and which does not cause any special or peculiar damage to any one, furnishes no ground of action in favor of an individual." See, also, *Willard v. Cambridge*, 3 Allen 574, the syllabus of which case reads as follows: "No action lies to recover damages for the obstruction of a highway, against a city which is bound to keep it in repair, by an individual whose place of business thereby becomes more difficult to reach, his business injured, the delivery of articles which he has sold and the gathering of his crops more expensive, his houses less desirable for tenants, and his rents diminished in value, if other persons suffer damages from the same cause, similar in kind, though less in degree." Also *Hill v. City of Boston*, 122 Mass. 344, in which Chief Justice Gray, after carefully reviewing the English decisions on this subject, concludes that "the result of the English authorities is that when a duty is imposed upon a municipal corporation for the benefit of the public, without any consideration or emolument being received by the corporation it is only where the duty is a new one, or is such as is ordinarily performed by trading corporations, that an intention to give a private action for a neglect of its performance is to be presumed."

The failure to keep a road or street in repair is not an offense against a single individual, but against the whole community. It is a public offense, and is therefore punishable by indictment. Many individuals might complain with propriety of a public offense, but the law does not delegate the punishment of such an offense to each individual that could reasonably complain, nor does it allow him to recover private satisfaction, in the shape of damages, unless he has received a personal injury, or some direct damage to his property. To allow every man who is injured in his calling or business

by reason of the bad condition of the roads and streets within the limits of a municipal corporation to sustain an action against the town or city, and receive compensation in damages, would lead to disastrous results. It would be difficult to say what degree of perfection in paving and draining its streets would give such a corporation immunity. The farmer, the furnisher of fuel, stone or brick, and in fact every one having occasion to pass over the street, could furnish a grievance; and the degree of perfection in the highway which would be acceptable to one might be entirely unsatisfactory to another, so that if the door is thrown open, and every person who has a real or supposed cause of complaint on account of the condition of the streets can recover damages against the city or town, it would lead to a multiplicity of suits which would be disastrous. This question was discussed at some length by Judge Green in the case of *Watkins v. County Court*, 30 W. Va. 657 (5 S. E. Rep. 654); and after commenting on our statute (section 53 of chapter 43 of the Code) which provides that any person who sustains an injury to his person or property by reason of a public road or bridge in a county, or by reason of a public road, bridge, street, sidewalk or alley in an incorporated city, village, or town, being out of repair, may recover all damages sustained by him by reason of such injury, etc., he says: "This being the extent of the liability in damages to any person, imposed by statute, for neglect of duty in reference to the public roads, either by the county court, or by a surveyor of roads appointed by the county court, can the county court be subject by suit to the payment of damages in any other case than that specified in the statute?" etc. And it will be perceived that streets, sidewalks or alleys in an incorporated city or town being out of repair stand in the same category. He says also on page 660, 30 W. Va., and page 654, 5 S. E. Rep.: "But it would seem to follow from the fact that as counties, or county courts, or other political corporations who manage their affairs, are created, not for any private advantage, but almost exclusively with a view to the policy of the state, and charged with the superintendence and administration of the local affairs of a county, as a mode of carrying out such public

policy, they would not be liable in damages for any neglect of a public duty to any individual who had directly suffered an injury from such neglect, unless the statute has expressly, or by necessary implication, made them responsible as corporations. At common law, such political corporations or such county would not be liable in any civil suit for damages resulting from a neglect of duty. And, in accordance with these views, it has been almost universally held, both in England and in this country, that neither a county nor a political corporation, managing its local affairs, causing public roads and bridges to be made and kept in repair, public school houses to be built and kept in repair, and other public duties to be performed, are ever liable, as corporations, to be sued by any individual for damages sustained by their neglect to perform such duties, or by the neglect of public officers or agents appointed by them to perform such duties, except when they are made responsible as corporations, either expressly or by necessary implication, for damages resulting from neglect of duty."

1 Shear. & R. Neg. § 253, in speaking of municipal corporations as state agencies, says: "The governmental powers of the state are further exercised by a great number of municipal and *quasi* municipal organizations, such as cities, towns, counties and boards, to which, for purposes of government, and for the benefit and service of the public, the state delegates portions of its sovereignty, to be exercised within particular portions of its territory, or for certain well-defined public purposes. To the extent that such local or special organizations possess and exercise governmental powers, they are, as it were, departments of *staté*. As such, in the absence of any statute to the contrary, they have the privilege and immunity of the state. They partake of the state's prerogative of sovereignty, in that they are exempt from private prosecution for the consequences of their exercising, or neglecting to exercise the governmental powers they possess. To the extent that they exercise such powers, their duties are regarded as due to the public, not to individuals. Their officers are not agents of the corporation, but of 'the greater public,' the state. No relation of agency existing between

the corporation and its officers with respect to the discharge of these governmental duties, the corporation is not responsible for the acts of omission of its officers therein. This is nothing more than an application and proper extension of the rule that the state is not liable for the misfeasance of its officers."

And again, under the heading, "The Damage Must be Special to Plaintiff," the same authors say in section 24: "It is not only essential to the maintenance of an action for negligence that some damage should have been suffered, but that damage must have been suffered by the plaintiff, or he has no cause of action. If, by reason of a breach of duty owed to the public, he has suffered no especial damage—that is, no damage other than such as every other member of the community has suffered in equal measure—a private citizen has no right to sue." See, also, note 2: "The fact that a citizen's route to his market is interfered with by obstructions placed in the highway is not such a special injury as will entitle him to maintain an action;" citing *Brant v. Plumer*, 64 Iowa 33 (19 N. W. Rep. 842) and *Sohn v. Cambern*, 106 Ind. 302 (6 N. E. Rep. 813).

My interpretation of our statute (section 53 of chapter 43 of the Code) is that any person who sustains a direct injury to his person or his property, as, for instance, having a limb broken or a horse disabled, by reason of the street or road being out of repair, may recover damages for such injury by an appropriate action in a court of competent jurisdiction; but it was not intended by said statute that a person who, in common with the community, suffers in his business relations by reason of the bad condition of the streets, should recover damages from the city or town for such injury. Therefore, my conclusion is that the court erred in refusing to strike out the plaintiff's evidence.

Another question is raised by counsel for the plaintiff in error, and that is whether the plaintiff could split up or separate his demand so as to bring it within the jurisdiction of a justice. The plaintiff, in his testimony, stated that he divided up his suits, and sued for three hundred dollars at different times. He says: "After suing first time, and

obtaining judgment, I waited, thinking the town authorities would fix up the street, and, after their failure to do so, sued again, and in like manner, after waiting a second time, after judgment, sued the third time." Our statute (Code, c. 50, s. 8) provides that "a justice shall have jurisdiction of all civil actions for the recovery of money or the possession of property, including actions in which damages are claimed as compensation for an injury or wrong, provided the amount of money or damages or the value of the property claimed does not exceed three hundred dollars, exclusive of interest and costs," etc. Prof. Minor, in his *Institutes* (volume 4, part 1, p. 206) says: "Where an entire claim exceeds twenty dollars and has been divided into several parts, each not exceeding twenty dollars, and separate securities are taken therefor, and all are due, it seems the better opinion, in this case, that the courts of record can not thus be deprived of their jurisdiction, nor the defendant to his right of trial by jury, and that a writ of prohibition will be awarded by the circuit court in order to prevent the usurpation;" citing *Hutson v. Lowry*, 2 Va. Cas. 45. The question raised in this case is not whether the justice had jurisdiction in this particular case, but whether the plaintiff had a right to divide up his claim so as to bring it within the jurisdiction, and then bring successive suits. In the case of *Stewart v. Railroad Co.*, 33 W. Va. 88 (10 S. E. Rep. 26) this Court held that, "in determining the question of jurisdiction in the action before a justice for a wrong, the amount claimed in the summons, not the damages shown by the testimony, must control." In the case of *Aulick v. Adams*, 12 B. Mon. 104, it was held that "in actions of tort the damages claimed usually determined the jurisdiction, as to amount." In the case under consideration, however, three successive suits appear to have been brought for the same cause of action, for three hundred dollars each; and the plaintiff states that his object was to avoid the jurisdiction of the Circuit Court, and bring his claims within the jurisdiction of a justice. He states that his claim was one thousand dollars. If his claim was *ex contractu*, there could be no question that it would not be allowed; and where the

claim he asserts is definite, as it was in this instance. I should think the same rule should be applied as in the case of contract. The right to divide his claim into three parts would imply the right to divide it into ten, and there would be no end to litigation and costs. In the case of *Bodley v. Archibald*, 33 W. Va. 229 (10 S. E. Rep. 392) this Court held that prohibition would lie to prohibit justices and other petty tribunals, which are limited by law to the decision of controversies where the amount falls within a specified sum, from exercising a jurisdiction wholly beyond their authority, even after judgment, but before the judgment has been fully carried into effect, "and in such cases the want of jurisdiction may be made to appear by matters *dehors* the record of the proceedings before such inferior tribunals." If the plaintiff in this case had sued for his whole claim, one thousand dollars, before the justice, we could not hesitate as to want of jurisdiction. Can he be allowed to do the same thing—effect the same result—by three or four suits? We say not.

The judgment must be reversed, and the cause remanded with costs.

CHARLESTON.

MACK *et al.* v. PRINCE *et al.*

Submitted January 16, 1895—Decided March 30, 1895.

JUDGMENT BY CONFESSION—ASSIGNMENT—INSOLVENT DEBTOR.

A judgment confessed by an insolvent debtor, together with the execution issued thereon, is, in effect, an assignment of the debtor's property to the extent of the lien or levy of such execution, is void as a preference under section two of chapter seventy four of the Code, and inures to the benefit of all the insolvent's creditors.

COUCH, FLOURNOY & PRICE for appellant, cited 37 W. Va. 562; Code, 1891, c. 74, s. 2; Id. c. 125, s. 43; Id. c. 141, s. 2; Id., c. 140, s. 5; Id., c. 74, s. 1; 22 W. Va. 357-365; 2 Dutcher 148; 42 Miss. 1; Dwarris on Statutes p. 695; 1 Bouv. Law Dict.

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41	143
40	324
47	367
40	32
52	51

222; 1 Rop. Leg. 446; 4 Vin. Ab. 449; 1 Supp. Vesey Jr. 309; 2 Id. 31; 1 Veni 45, 411; 4 East Rep. 501; 4 Ves. 815.

SIMMS & ENSLOW for appellees, cited 37 W. Va. 552; 50 N. W. Rep. 1030; 21 Wall. 500; 102 U. S. 263; 11 S. E. Rep. 337; 129 U. S. 330; 27 N. E. Rep. 1065; 10 Id. 903.

DENT, JUDGE:

The facts are as follows to wit: On the 17th day of June, 1893, the defendant D. H. Nugen, in the clerk's office of the Circuit Court of Cabell county confessed a judgment in favor of P. H. Noyes & Co. for the sum of three hundred and ninety seven dollars and thirty four cents, on which execution was forthwith issued, and placed in the hands of the sheriff of said county, and was levied on a certain stock of store goods belonging to said Nugen. Before said execution, said Nugen made a sale of said goods to the defendant Walter Wilson at the price of one thousand two hundred dollars, to be paid on a debt due himself, and said judgment of P. H. Noyes & Co., and a debt due Mack, Stadler & Co.

Several parties then sued out attachments and levied on said goods; among them Prince, Dunn & Co. and Sehon, Blake & Co., who join in this appeal but have made no assignment of error. Mack, Stadler & Co. then filed their bill in chancery, convening all the parties in interest, and praying that the sale to Wilson be held a general assignment for the benefit of all the creditors of said Nugen, and the proceeds be distributed accordingly. An answer was filed by P. H. Noyes & Co., claiming the right to have their judgment and execution paid in full; also by the attachment creditors, claiming the benefit of their attachment liens. The cause was referred to a commissioner, and on the coming in of his report the various defendants excepted thereto. On the 13th day of December, 1893, the court entered a decree overruling the exceptions to the commissioner's report, confirming the same, and distributing the net proceeds of the property among all the creditors *pro rata*; from which decree P. H. Noyes & Co. appeal, and assigning the following errors: *First*, overruling petitioner's exceptions to the

commissioner's report; *second*, setting aside and annulling petitioner's judgment, and the execution thereon, and refusing to give it priority of payment out of the funds derived from the sale of said goods; *third*, distributing said funds *pro rata* among all the creditors of said D. H. Nugen.

Exceptions to report are as follows: "P. H. Noyes & Co., except to within report (1) because the commissioner fails to report their writ of *feri facias* against D. H. Nugen as a first lien on the stock of goods of D. H. Nugen; (2) because the commissioner reports the judgment in their favor against D. H. Nugen as void; and for other reasons apparent on the face of the report."

The only question raised by these exceptions and presented for the consideration of the court is whether the language used in section 2, chapter 74, of the Code, includes within its meaning, according to legislative intent, a confession of judgment and execution thereon. In other words, whether the statute is rendered abortive by the failure to embrace confessed judgments therein; for, if such be the case, all an insolvent debtor will have to do to entirely evade the provisions of the statute is to go into the circuit court clerk's office, and confess judgments to his favored creditors, according to the priority on which he wants them paid; thus defeating the very object of the law, and accomplishing as complete a preference among his creditors as if made by sale, assignment, or transfer, and just as expeditiously. The word "charge" has a specific technical and also a broad legal meaning, under which it includes any lien on property of any description. In construing a word susceptible of two meanings, the court will give it such construction as will render the law effective and not nugatory. 3 Am. & Eng. Enc. Law 118, note 3; 23 Am. & Eng. Enc. Law 319, 362, 364; 1 Cooley Bl. 59, 61, note 21. The section under consideration provides that "every gift, sale, conveyance, assignment, transfer or charge, made by an insolvent debtor to a trustee, assignee or otherwise, giving or attempting to give a priority or preference to a creditor or creditors of such insolvent debtor, or which provides or attempts to provide for the payment in whole or in part, of a creditor or creditors of

such insolvent debtor, to the exclusion or prejudice of other creditors, shall be void as to such priority, preference or payment so made; and all such gifts, sales, conveyances, assignments, transfers and charges, shall be deemed void as to such priority, preference or payment; and every such gift, sale, conveyance, assignment, transfer or charge shall be deemed, taken and held to be made for the benefit of all the creditors of such debtor except as heretofore provided; and all the estate, property and assets, given, sold, conveyed, assigned, transferred or charged as aforesaid, shall be applied upon the debts and paid to the creditors of such insolvent debtor *pro rata*; provided that nothing in this section shall be taken or construed to change, impair or affect any prior lien, priority or encumbrance acquired by a creditor on the real estate of such debtor in any manner now prescribed by law," etc. The plain intention of this enactment was to prevent preferences among the creditors of an insolvent debtor, and secure a *pro rata* distribution of his assets. The gist of the whole matter is whether the debtor, recognizing his insolvency, is aiding, abetting, or colluding with the creditor to secure to him payment of his debt in priority or preference of his other creditors; and any way in which this could be accomplished is included within the intent of the statute; and, if the language used can be construed so as to cover this intent, it is the duty of the court so to construe it.

The appellants are here claiming the benefit of a preference forbidden by the statute, and the reason urged in support of their claim is that they have discovered an oversight of the legislature, which has enabled them to evade its enactment, provided they can convince the court that it is contrary or derogatory to the common-law, and should be strictly construed. While this may be true, yet the statute should not be abrogated or annulled or rendered absurd. Equality is equity, and the legislature was seeking to produce equality among the creditors of an insolvent debtor, and put it beyond his power, if possible, to turn his assets over to preferred creditors, when the rights of all his creditors should be regarded as equal, and each entitled to an equal share in assets insufficient in amount to satisfy all in

full. The debtor has a peculiar knowledge of his own insolvency, and it is not equitably right that he should be permitted to use this knowledge in such way as to advance the interest of some to the detriment and loss of other creditors; and the law, to prevent this injustice, deprives the creditor of any advantage gained by him through the connivance of the debtor, and places all creditors on an equal footing as to such advantage. And yet it does not prevent a creditor acting entirely independent of the debtor from gaining any possible preference or priority of payment against any estate, real or personal, of the debtor, in any manner prescribed by law; but it is the debtor's hands and conscience it seeks to bind according to the rules of common honesty and fair dealing among men, and therefore, when he seeks to give an undue preference to one of his creditors, the law holds it to inure to the benefit of all indiscriminately. The good intent of the debtor, which must be deduced from the circumstances surrounding the transaction, is involved; and if it reasonably appear from the transaction that he was not endeavoring to give the creditor an undue priority or preference over others, but was simply securing a just debt, then the statute would not destroy the security. The language used is, "giving or attempting to give," or "provides or attempts to provide," "to the exclusion or prejudice of other creditors." If he is not insolvent the law does not apply; but, if he is insolvent, he must treat all alike.

In this case personal property is alone affected and it is unnecessary to discuss the effect of a judgment lien as to real estate, and it would be improper to review the decision in the case of *Refining Co. v. Quinn*, 39 W. Va. 535 (20 S. E. Rep. 576) the same questions of law not being presented. While the provisions of the section are derogatory to the common-law, they are remedial in their nature, and therefore should be liberally, and not strictly, construed, "so as to prevent the mischiefs at which it is aimed." *White v. Cotzhausen*, 129 U. S. 329 (9 Sup. Ct. 309); *Hudler v. Golden*, 36 N. Y. 446; *Hart v. Cleis*, 8 Johns. 41.

In the case of *Richardson v. Thurber*, 104 N. Y. 610 (11 N.

E. Rep. 133) it is said: "The word 'assignment' may sometimes have reference to the instrument which affects the transfer, and sometimes to the transfer itself, considered as a legal effect or result;" and "in such cases the context or the apparent meaning determines the sense in which the word is used." And the same may be said of the words "transfer" or "charge." In the section under consideration it is the "legal effect or result," rather than the instrument, which the legislature had in contemplation in using the words "assignment," "transfer," or "charge," and it intended to cover thereby and include therein any transaction, of whatever kind or character, which an insolvent debtor might use or attempt to use to secure an appropriation of his property, or a part thereof, for the benefit of one creditor, to the exclusion or prejudice of his other creditors. The judgment confessed and execution issued and levied operated in effect as an assignment and transfer of the debtor's property to the extent of the levy as completely, to all intents and purposes, as any other mode of assignment or transfer could have done.

In the case of *White v. Cotzhausen*, 129 U. S. 342 (9 Sup. Ct. 309) Justice Harlan says: "We only mean by what has been said that when an insolvent debtor recognizes the fact that he can no longer go on in business, and determines to yield the dominion of his entire estate, and in execution of that purpose, or with intent to evade the statute, transfers all, or substantially all, his property to a part of his creditors, in order to provide for them in preference to other creditors, the instrument or instruments by which such transfers are made and that result is reached, whatever the form, will be held to operate as an assignment, the benefit of which may be claimed by any creditor not so preferred who will take appropriate steps in a court of equity to enforce the equality contemplated by the statute." And on page 344, 129 U. S., and page 309, 9 Sup. Ct., he quotes approvingly from the opinion of Judge Treat in *Freund v. Yaegerman*, 26 Fed. 812, 814, as follows: "You may call it a mortgage, or you may make a confession of judgment, or use any other contrivance, by whatever name known; if the pur-

pose is to dispose of an insolvent debtor's estate, whereby a preference is to be effected, it is in violation of the statute." And he continues on the same page (344, 129 U. S., and page 309, 9 Sup. Ct.): "Surely the mere name of the particular instruments by which the illegal result is reached ought not to be permitted to stand in the way of giving the relief contemplated in the statute. Courts of equity are not to be misled by mere devices, nor baffled by mere forms." *Berger v. Vardmann*, 127 N. Y. 281 (27 N. E. Rep. 1065); *Preston v. Spaulding*, 120 Ill. 208 (10 N. E. Rep. 903); *Miners' National Bank's Appeal*, 57 Pa. St. 193; *Winner v. Hoyt*, 66 Wis. 227 (28 N. W. Rep. 380); *Wilks v. Walker*, 22 S. C. 108, 111; *Wright v. Fergus Falls Nat. Bank* (Minn.) 50 N. W. Rep. 1030.

The conclusion, therefore, is that the judgment confessed, together with the execution and levy, was, in effect, an assignment, made by the debtor, giving or attempting to give a priority or preference to a creditor, to the exclusion or prejudice of other creditors, and therefore, to the extent of the property levied on, was void, and operated as an assignment of such property for the benefit of all the creditors of the debtor.

The judgment, however, was not void *in toto*, but remained good as between the debtor and the creditor, and the effect of the decree complained of is to so hold. The court referred the case to the commissioner to ascertain whether or not the said judgment was and is void under the statute in such case made and provided. The commissioner reported that it was so void. And the court, in confirming said report, decreed that the said confessed judgment, and execution issued thereon be set aside, annulled, and held to be of no effect, so far as the same gave or attempted to give a preference to the creditor; thereby simply annulling the preference as to the property in controversy, and leaving the judgment and execution in full force and effect in all other respects—that is to say, to the extent they operated as an assignment contrary to law, they were void, otherwise not.

The attaching creditors who join in this appeal do not

assign errors, nor have they filed briefs, and it is apparent they have abandoned their pretensions that the sale from the debtor, Nugen, to defendant Wilson was absolutely void, as having been made with intent to delay, hinder and defraud creditors; for it is plain that it was a mere attempt on the part of the debtor to prefer favorite creditors, which he would have had the right to do prior to the enactment of section 2, chapter 74, of the Code, and that by virtue of the provisions of this section it inured to the benefit of all the creditors. But the confessed judgment and execution operated as a general assignment for the benefit of all the creditors, prior to the sale to defendant Wilson, as to all the property on which said execution was a lien or levied, and hence the subsequent sale could not affect the status of the property.

The partial conduct of the insolvent debtor in attempting in violation of the law to secure a preference to any one of his creditors amounts to such a fraud as to deprive him of further control of the property involved, and, there being no other administrative tribunal provided, at the instance of any interested party a court of equity will assume the responsibility.

No error appearing in the decree prejudicial to the appellants, it is affirmed.

CHARLESTON.

MAYNARD v. NORFOLK & W. R. Co.

Submitted January 16, 1895—Decided March 30, 1895.

1. RAILROAD COMPANIES—LIVE STOCK—NEGLIGENCE.

In order to charge a railroad company with damages for killing stock straying upon its track, negligence on the part of the company must appear, and the burden of showing it rests upon the plaintiff.

2. RAILROAD COMPANIES—CATTLE GUARDS.

The provision of section fourteen of chapter forty two of the Code, requiring railroad companies to construct and maintain cat-

the guards upon land condemned, is for the benefit of the land-owner; and therefore the mere omission to do so will not entitle another party, whose stock is injured while straying upon the railroad track, by trains, to recover damages, though, but for the want of it, the stock would not have been where it was injured.

E. E. WILLIAMS and CAMPBELL & HOLT for plaintiff in error, cited Code, 1891, c. 42, s. 14; 15 W. Va. 270; 1 Redf. Railw. (4th Ed.) 465; 25 Ver. 150; 42 Ver. 375; Redf. Am. Ry. Cas. 351, note; 34 W. Va. 206; 35 W. Va. 565-6

R. H. HOYLE, B. H. OXLEY and E. W. WILSON for defendant in error, cited 35 W. Va. 438.

BRANNON, JUDGE:

In an action brought by Maynard against the Norfolk & Western Railroad Company before a justice and carried by a writ of *certiorari* to the Circuit Court of Logan county, Maynard recovered one hundred and forty dollars damages for killing his horse—the recovery being, not by verdict, but on a finding of the court in lieu of a jury—and the company sued forth this writ of error.

It is settled that to charge a railroad company for killing stock straying upon its track, the owner of the stock must prove negligence on the part of the company. There are so many cases heretofore decided by this Court holding this principle and discussing this subject that it would be a waste of time to further discuss it here. *Blaine v. Railroad Co.*, 9 W. Va. 252; *Baylor v. Railroad Co.*, *Id.* 270; *Hawker v. Railroad Co.*, 15 W. Va. 628; *Washington v. Railroad Co.*, 17 W. Va. 190; *Layne v. Railroad Co.*, 35 W. Va. 438 (14 S. E. Rep. 123); *Hoge v. Railroad Co.*, 35 W. Va. 562 (14 S. E. Rep. 152).

Johnson v. Railroad Co., 25 W. Va. 570, pointedly holds, as those cases in effect do, that the burden to show negligence is upon the plaintiff.

It is useless here to recite the evidence, as it would be no precedent for future practice, and it is necessary only to state legal principles arising from the facts as they appear to us. We think there is a failure to show negligence on

the defendant's part—a clear inadequacy of evidence to sustain the action on that basis.

There is another question of law proper to be decided. Touching it I make the following extract from brief of counsel which I regard a fair statement of facts pertinent and necessary for the understanding of the question, and as a presentation of the law of that question: "In order that the second question may be clearly understood, it will be necessary to call attention to the location of the place where the accident occurred. The plaintiff lived a short distance east of the town of Williamson. To the east of him, and following the railroad track, the witness James Cary lived. And still further eastward, and entirely disconnected from the plaintiff's place, is what is known as the 'Widow Lawson Farm.' Through the latter farm the railroad company condemned its right of way, and the place was cleared and fenced at the time of condemnation; and it became the duty of the company, in consequence of section fourteen of chapter forty two of the Code, to fence both sides of its track, and put in suitable cattle guards through the land so condemned, and it did construct the required fences, and place a cattle guard at the eastern line of the Lawson place, but omitted to put one at the western line thereof. This made an inclosure on three sides, with an opening at the west, into which, presumably, the plaintiff's horse strayed from the commons below; and the question is, does the omission on the part of the railroad company to put in Mrs. Lawson's cattle guard render it liable for the plaintiff's horse, killed on a part of its right of way from which such a guard would have excluded it? It will be observed that leaving the guard out simply extended and increased the size of the common through which the railroad ran, and upon which the horse was already grazing. The absence of the guard did not admit the animal to the railroad track. He was already grazing upon an inclosed portion of it, and the omission of the guard simply enabled him to change his position on the track, and make choice of a place in which to die. For whose benefit is section fourteen of chapter forty two intended? That portion of the section involved reads as follows:

'And in all cases when the property taken under this chapter is by a railroad company, and is land which has been cleared and fenced, the said railroad company shall construct and forever maintain suitable farm crossings, cattle guards and fences on both sides of the land thus taken.' The very terms of this statute indicate pretty clearly the object of the legislature. It only required certain portions of the track to be fenced, and those portions are located and determined by the manner in which the title thereto was acquired, whether by condemnation or not, and the character of the land at the time of its acquisition, whether fenced and cleared or not. No right of way purchased or donated, or that runs through unimproved land, whether condemned or not, need be fenced. What is the meaning of such a restricted requirement? Why did not the legislature require railroad companies to fence their tracks from end to end? Why not compel them to fence through woodland, through cleared but unfenced common, through cleared and fenced lands donated or purchased? Had it been the object of the legislature, by this act, to benefit or protect any one but the adjoining proprietor—that is, the public at large—it would have required fences wherever that public was likely to come in contact with the track. The public and its property is just as likely to come upon the right of way where it has been purchased or donated through improved lands, or where it has been condemned through wild lands, or open common, as it is at a point where it has been condemned through improved land. If the legislature had for its object the protection of the public and its property by the construction of fences, is it not a little peculiar that it should require one mile of track to be fenced, and permit ten miles to lie open? The inference from this is almost irresistible that the legislature did not have the community at large in mind at all. It did not even contemplate the greater safety of passengers upon railroad trains. It simply undertook, by this restricted requirement, to make railroad companies place the landowner, whose cleared and fenced land they had taken by eminent domain, back in the position in which they found him, or as nearly so as practicable. Here

he was not giving, but resisting, and without an opportunity to impose conditions; refusing to sell, and in consequence without opportunity to stipulate for fences. His wheat field is split in two, and a strip from eighty to a hundred feet wide taken thereout. Before he had one field, inclosed upon all sides. Now he has two, each of which is open upon one side, and his crops are at the mercy of the 'razor back.' The law has permitted this to be done without the owner's consent, and, furthermore, directed the commissioners who assessed his damage not to take the cost of fences made necessary by the taking into consideration at all; providing in lieu thereof, however, as above quoted, that the company condemning shall inclose the two newly made fields by fencing both sides of its track clear through—thus by statute giving back to a man his fences, whose fences had been by statute taken without his consent. Unquestionably the obligation is imposed for his benefit alone. No one else would seem to have any interest in the matter whatever. So far as any one else is concerned, the company may leave its track open, and that person may let his cattle run at large. The company is simply required to exercise ordinary care to avoid injury to cattle so running at large when they come upon its track, and the owner thereof, so permitting them to run at large, takes the risk of injury to them from unavoidable accident. *Baylor v. Railroad Co.*, 9 W. Va. 270. The intention of the legislature in the passage of this statute would appear to be so manifest as to dispense with the citation of authorities in support of our view; but, as there has been more or less discussion of the subject before our Circuit Courts, it might be well to indulge in a few: 1 Redf. R. R. (4th Ed.) p. 465, par. 3; *Jackson v. Railroad Co.*, 25 Vt. 150; *Bemis v. Railway Co.*, 42 Vt. 375; Redf. Am. Ry. Cas. note, p. 351. The latter part of the paragraph first above cited from Redfield on Railways read as follows. 'The obligation to make and maintain fences, both at common-law and under the statute, applies only as against the owners or occupiers of the adjoining close.' Chief Justice Redfield, in the case of *Jackson v. Railroad Co.*, *supra*—an extract from which is appended as a note to page 351 of his American

Railway Cases, above cited—used the following language: ‘We can not conceive, then, how any one can be said to be directly interested in the maintaining of fences upon a railway, beyond the adjoining proprietors of land, and those who may travel upon the road, either as passengers or workmen. And in regard to this latter class of persons, who are only interested in this matter temporarily, for the purpose of their own security while upon the road, we have no occasion to speak here. The adjoining proprietors certainly are primarily and principally interested in the maintaining of fences upon the line of railways. There is no doubt a remote incidental, and contingent interest in all the citizens, in having such roads carefully fenced. One’s teams, cattle, and children, even, are thereby rendered less likely to receive damage by reason of the running of such roads. But this is an interest of so remote and contingent a character as scarcely to be supposed to form the basis of so extensive and expensive a charge upon such companies by the legislature. Certainly it should not be so held, unless so expressed in *totidem verbis*, or by the most obvious implication.’ The above observations of Judge Redfield were made upon a statute that required the railway company ‘to build and maintain sufficient fence, upon each side of their railway, through the whole route thereof.’ How much stronger then is the case, like the one at bar, where only portions of the track was required to be fenced.”

In *Hoge v. Railroad Co.*, 35 W. Va. 566 (14 S. E. Rep. 152) Judge Holt expressed the opinion that cattle guards are for the benefit of the landowner on whose lands they are. So I do not regard the omission to put this cattle guard in as alone sustaining the action.

For these reasons we reverse the judgment and finding, and, rendering such judgment as the Circuit Court ought to have rendered, we enter judgment for defendant.

CHARLESTON.

CHANCELLOR v. SPENCER *et al.*

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Submitted January 28, 1895—Decided April 3, 1895.

1. BILL OF REVIEW.

A person is not entitled to file a bill of review who is not a party to the original suit, and whose rights are in no manner affected by the decree sought to be reviewed.

2. BILL OF REVIEW—WAIVER.

A joint owner of property, who, being a party to a suit, allows his undivided interest in such property to be sold to satisfy judgment liens thereon, can not file a bill of review to set aside the decrees in such suit, for the sole purpose of having the property, not being susceptible of partition, sold as a whole, for by his negligence he has waived whatever rights he may have had in this respect.

HUTCHINSON, HUTCHINSON & CAMDEN for appellants, cited 38 W. Va. 106; 3 W. Va. 676; 5 W. Va. 199; 6 W. Va. 369; 26 W. Va. 1; 31 W. Va. 688; 1 Dan'l Chan. Pl. & Pr. (6th Am. Ed.) 262; Id. 246; 20 Fed. Rep. 784; 1 Gratt. 425; 10 Leigh 5; Code, c. 65, s. 15; Id. c. 71, s. 17.

DENT, JUDGE:

The Circuit Court of Wood county, at the August term, 1892, entered a final decree dismissing a bill of review filed by Camden Spencer in the chancery cause of *W. N. Chancellor v. E. M. Spencer et al.*, for the reason that the errors assigned were not sufficient to authorize a review and reversal of the decree complained of, and from this decree Camden Spencer and E. M. Spencer appeal to this Court.

The errors assigned are as follows, to wit: (1) Because it is apparent upon the face of the bill and the papers of the cause that the decree rendered in the said suit of *W. N. Chancellor* was wholly erroneous, in that the minor children of E. M. Spencer and Mary P. Spencer, deceased, whose

interests were to be vitally affected, were not made parties to that suit. (2) E. M. Spencer, if he has any interest by the curtesy in the said house and lot conveyed to him as trustee for his wife, Mary P. Spencer, took only such interest as belonged to her, to wit, an equitable interest, or use of the property during her life. At her death the fee went to the four minor children. If, however, such construction be given to section 17, chapter 71, Code, 1891, as shall conflict with this view, it in no wise relieves the proceedings of the first error complained of, *viz.*: these minor children were not made parties to the suit, nor did they appear by guardian or otherwise. (3) It was manifest error in the court, having in his hands at the same time both the Chancellor suit and the Coffer petition, each seeking a sale of the same property, to decree a sale in each case. The court should, of its own motion have consolidated the two, and directed that they be heard together. The effect of the separate decrees in each, in force at the time of sale, was to sacrifice the property, no matter which decree the property was sold under. (4) The court erred in directing the sale of E. M. Spencer's interest in the wharf property without first ascertaining, by reference to a commissioner, the other joint owners of said wharf property, and the extent of their several interests, and requiring them to be made parties, that they might be apprised of the sale, as being most likely, in view of their own interests, to offer better prices than would casual purchasers or strangers.

The decrees sought to be reviewed were entered in a suit brought by W. N. Chancellor to enforce a judgment lien against two certain pieces of property alleged to be owned by the judgment debtor, E. M. Spencer to wit: (1) A life estate in a certain house and lot belonging to Mary P. Spencer, deceased, his wife. (2) An undivided interest in a certain wharf property. E. M. Spencer, though a party served with process, made no appearance or defense, but permitted the decrees to be entered on bill confessed.

Camden Spencer was not a party, nor in privity with any party, to the suit; and he could not be bound, nor could his rights be affected, by any decree entered therein, and there-

fore he is not entitled to maintain a bill of review. 1 Bart. Ch. Prac. p. 204, § 64. He claims that E. M. Spencer was not entitled to a life estate in the property of his wife, Mary P. Spencer, deceased. If this be true, then none was sold, as the court could only sell such interest as E. M. Spencer had in the property, in the absence of those lawfully entitled to it. He further claims that if the life estate did exist, it was an injury to the heirs to sell it separately from the reversion, and that the property should be sold as a whole, to insure a fair price. This can be easily accomplished by making the present owner of the life estate a party to the suit to sell the reversion, as it makes no difference to the reversioners whether the life estate is owned by E. M. Spencer or by W. S. Tracewell as in one case the purchase price of the life estate will go to E. M. Spencer's creditors; in the other, to W. S. Tracewell. Therefore, in no event is Camden Spencer interested in reviewing the decrees complained of, and the Circuit Court did right to dismiss his bill.

As to E. M. Spencer, while he might have had the right to have all the parties interested in the two properties before the court, and have had them partitioned or sold as a whole, yet by his negligence he acquiesced in the proceedings in the suit, and can not now be heard to complain. Bart. Ch. Prac. 335.

The decree complained of is therefore affirmed.

CHARLESTON.

COSNER et al. v. McCrum et al.

Submitted January 25, 1895—Decided April 3, 1895.

1. DEED—SEAL

A paper purporting to be a deed or gift of real estate, which has a scroll annexed to the grantor's signature, with the word "seal" written in it, but which fails to recognize said scroll as a seal in the body of the instrument, but which paper has been duly acknowledged for record by the grantor, held to be a deed.

2. DEED—HUSBAND AND WIFE.

A deed from a husband to his wife for real estate, while inoperative and void at law, is nevertheless valid in equity, and will confer upon the wife a good equitable estate, which in all cases will be enforced against the husband by a court of equity.

DAYTON & DAYTON and A. B. PARSONS for appellant, cited Code, c. 74, s. 4; Id., c. 72, s. 11; Id., c. 104, s. 14; 34 W. Va. 116; 35 W. Va. 771; 2 Gratt. 266; 9 Leigh 511, 514, 515; 4 Gratt. 283; 10 W. Va. 630; 54 Conn. 330; 64 Am. Dec. 363; 27 N. J. Eq. 157; 3 N. H. 432; 32 W. Va. 360; 5 Law R. & R., § 2269.

W. B. MAXWELL for appellees:

What shall constitute the record.—Code, c. 135, ss. 5, 6.

This Court may award certiorari.—30 W. Va. 186.

Laches in asserting right.—1 Pom. Eq. §§. 418, 419; 1 Bart. Ch. Prac. 90.

Enforcing voluntary contract for a gift.—3 Pom. Eq. §§. 370, 1293, 1405; 32 W. Va. 463; 9 W. Va. 79; 76 Va. 72; 76 Va. 517.

Amending answer.—35 W. Va. 70.

ENGLISH, JUDGE:

On the 23d day of November, 1891, C. P. Cosner, U. S. Cosner, Freeland H. Cosner and others, parties defendant in a certain suit in equity, pending in the Circuit Court of Tucker county, in which S. McCrum was plaintiff, filed their petition, verified by affidavit, in the nature of a bill of review, alleging errors in a decree of sale which had been entered in said cause at the June term, 1891, of said court, and praying for a review and hearing of said decree, and a correction of the errors therein, which petition, with its exhibits, was ordered to be filed; and the plaintiff, S. McCrum, appeared thereto, and waived the service of process therein, and tendered his answer to said petition, admitting that said decree of sale was erroneous in so far as the same directed a sale of the land directed to be sold before the assignment of the widow's dower therein, but denying that there was any other error in said decree; and on his motion said answer was ordered to be filed, upon consideration whereof it was ordered

that so much of said decree as directed a sale of the land of Solomon W. Cosner, deceased, which land was ordered to be sold before the assignment of the widow's dower therein, be reversed and set aside.

Commissioners were appointed to go upon the two hundred and one acres of land in the commissioners' report mentioned, and ascertain if the same could be identified and located, and, if so, to lay off and assign unto Elizabeth Cosner, widow of Solomon W. Cosner, deceased, one third thereof, as and for her dower therein, having regard to quantity and quality; and said commissioners were directed to further ascertain and report if the said Solomon W. Cosner died seised of any other lands, and, if so, they should assign to his said widow her dower portion therein, having regard to quantity and quality.

The errors alleged and relied upon by the petitioners, C. P. Cosner and others, to annul and set aside the decree rendered in said cause of *S. McCrum v. F. H. Cosner, administrator, etc.*, entered at the June term, 1891, are: *First*, That the said decree directs two hundred and one acres of land to be sold, but nowhere upon the face of said decree, or in the papers or proceedings in the cause, is there any identification of the said two hundred and one acres, or any description thereof whereby the same can be in any manner located, or its boundaries defined, and it was wholly impossible for petitioners to know or understand which one of their lands was to be sold. *Second*. The land was decreed to be sold subject to the dower of the widow, Catherine Cosner, who had in no way expressed her election to take her dower interest in money, instead of in kind. *Third*. Said petitioners alleged that said Solomon W. Cosner died seised of no real estate, but all that he was ever possessed of was conveyed away by him in his lifetime, by largely voluntary deeds, which were executed more than five years before the institution of said suit; that by deed of gift, purely voluntary, as shown on its face, nearly thirteen years before this suit was brought, and when the said Solomon W. Cosner was in no way indebted, he conveyed all the lands of which he was possessed, consisting of three tracts, of five hundred and

twenty four acres, one hundred and sixty six acres, and one hundred and forty eight acres, in Canaan Valley, fully described in said deed, to his said wife, Catherine Cosner, and her children, which deed was duly acknowledged, delivered and admitted to record; that subsequently said Catherine Cosner, the wife, and W. H. H. Cosner and wife, Armeda J. Flanagan and husband, C. C. Cosner and Elizabeth Cosner (then Harr) reconveyed their interests in said lands to said Solomon W. Cosner, who shortly after, by deed dated March 9, 1880, conveyed one hundred and sixty six acres of said lands to Emile and F. H. Cosner, and by deed of same date conveyed to Melissa J. Cosner, the wife of W. H. H. Cosner, one hundred acres thereof, and by deed of same date conveyed to C. C. Cosner one hundred acres, all of which deeds were voluntary, but were delivered and recorded at least ten years before said suit was brought; that on the 20th day of July, 1880, by deed of that date, and for a valuable consideration, said Solomon W. Cosner conveyed one hundred and eighty six acres of said lands to his cousin Daniel Cosner, and by deed dated April 26, 1888, for a valuable consideration, the said S. W. Cosner sold and conveyed eighty eight acres of said land to Mitchell Carroll and wife, both of which deeds were duly admitted to record. which conveyances more than covered the entire interest of said S. W. Cosner in said lands, and therefore the remainder of said lands were in no wise subject to his debts. And for these reasons they pray that said final decree may be annulled and set aside, that said lands may be held exempt from the debts of said Cosner, and that the title thereto be held to be vested in petitioners and the other beneficiaries under the deeds therein set forth, and, there being no assets for the payment of said debts set forth in said decree, that said original cause may be dismissed, *etc.*

On the 14th day of June, 1892, the defendant S. McCrum obtained leave to file an amended answer to the plaintiff's petition, in which he claims that from an inspection of the alleged deed from Solomon W. Cosner to Catherine Cosner and her children, it will be seen that the same is no deed, but is only an agreement, so far as the land mentioned therein

is concerned, to make a gift thereof to said Catherine Cosner and her children, and no actual conveyance of said land was ever made to said donees, and that said alleged deed is the only shadow of claim the said petitioners have, or ever had, to said land, except as heirs of said Solomon W. Cosner, and that said agreement to make a gift did not vest any right, legal or equitable, in said donees, and, no actual transfer of said land having been made, the said agreement, as against respondent, a creditor of Solomon W. Cosner, was an absolute nullity, and of no effect whatever. He also directs attention to the fact that said alleged deed is not under seal, the description of the property claimed to have been conveyed thereby vague and uncertain, and but one guaranty is named therein, and that said pretended deed is void for uncertainty; that after the execution of said pretended deed the parties thereto regarded the same as an absolute nullity. Said Solomon W. Cosner remained in the possession of the land, and treated it as his own, and the said donees, nor any of them, at any time, ever attempted to use, control, or manage the same, or any part thereof, and after the death of the said Solomon W. Cosner, partitioned the same among themselves, as his heirs, and exchanged mutual deeds of partition; and the said S. W. Cosner claimed such exclusive and notorious ownership over said land that after the execution of said alleged deed to Catherine Cosner, *etc.*, he actually conveyed away two large parcels thereof to Daniel Cosner and Mitchell Carroll, and made general warranty deeds therefor.

Respondent also denies the right of Freeland H. Cosner to have anything in said petition entertained for any purpose, for the reason that he filed his answer in the original cause, raising the very questions sought to be reviewed by said petition, and the same were decided against him, and the opinion of the court upon these questions was not only conclusive against the said Freeland H. Cosner, but was also conclusive against all the petitioners. And respondent charges that the questions sought to be raised by said petition are not such questions as can be raised on a proceeding of this kind, but such of said petitioners as let said original

cause go by default can only review said decrees by errors appearing upon the face of the proceedings, and can not in this way bring in matter to the attention of the court; but, if said petition is to be treated as a bill of review, then the petitioners do not present such a statement of fraud, accident, surprise, or adventitious circumstance as is entitled to be entertained for the purpose sought by said petition, nor do any such circumstances exist as will enable them to amend their said petition so as to be entertained. And he prays that said petition be dismissed, and that the lands of which Solomon W. Cosner died seised be sold, subject to the dower of the widow therein, to satisfy respondent's debt against the same.

This amended answer was excepted to by the petitioner because it presented no new matter of defense, and no good reasons are shown for its filing. On the 23d day of June, 1892, the court overruled the exceptions to said amended answer, and the petitioners replied generally thereto, and the cause was referred to a commissioner to report all the facts and circumstances connected with the title to the land claimed by the plaintiff, S. McCrum, to have been owned by S. W. Cosner at the time of his death, reporting specially what, if any, control and possession said Solomon W. Cosner exercised over the land in controversy after the date of the deed from him to his wife and children.

On the 29th day of June, 1893, the cause was heard upon the report of James W. Bowman, surveyor, and others, commissioners to assign dower to said widow, the former orders and decrees therein, and upon the report of the commissioner to which there is one exception filed by the defendants, and upon the evidence taken before said commissioner; upon consideration whereof the exceptions to the report of commissioners Valentine and Adams were overruled, and said reports confirmed, except so far as therein modified; the decree confirmed the report of commissioners assigning dower to Catherine Cosner, widow of Solomon W. Cosner; ascertained that said S. W. Cosner, at the time of his death, was the owner of three tracts of land, one containing two hundred and twenty one and three fourths acres, one containing one hundred and

forty three and three fourths acres, and the mill lot of one acre; ascertained the amounts due the plaintiff, S. McCrum and to Freeland H. Cosner, as administrator of Solomon W. Cosner; and decreed unless there was paid to the parties entitled thereto, respectively, their debts, as therein ascertained to be due them, and the costs of suit, within thirty days, a special commissioner, therein named, should make sale of the land ascertained to have been owned by said S. W. Cosner at the time of his death, or so much thereof as might be necessary to satisfy the said debts and costs, upon the terms therein prescribed, which sale was to be made subject to the widow's dower therein; and a writ of possession was awarded said Catherine Cosner, if desired by her, to have possession of the land so assigned to her as her dower. And from this decree C. P. Cosner obtained this appeal.

In examining the questions raised by the petition of C. P. Cosner and others, in the nature of a bill of review, which petition must be so regarded, we encounter some difficulty in passing upon the questions raised by said petition, in the absence of the original record, or the final decree which is sought to be reviewed. Enough, however, appears from the allegations of the petition which are uncontradicted, and the exhibits therewith filed, to enable us to pass upon the material questions raised.

The third error alleged and relied upon by the petitioner raises the question as to the effect of the paper filed as Exhibit X with the petition, which purports to be a deed of gift from Solomon W. Cosner to his wife and children, bearing date July 12, 1877, whereby, in consideration of love and affection, it is alleged in said petition, he conveyed all the lands of which he was possessed unto his wife and children, which deed was duly acknowledged and admitted to record, which deed was voluntary, and was acknowledged and admitted to record nearly thirteen years before this suit was instituted. It is contended in argument that said Exhibit X is not a deed, because the scroll and seal are not recognized in the body of the instrument; and while it is true that our statute (Code, c. 13, s. 15) provides that "when the seal of a natural person is required to a paper, he may affix thereto a

scroll by way of seal or adopt as his seal any scroll, written, printed or engraved made thereon by another," a distinction appears to exist between instruments which are not required to be acknowledged and recorded and those that are only to be signed and sealed. Where the latter do not recognize the scroll or seal in the body of the instrument, the weight of authority is that such papers are not sealed instruments. Where, however, a scroll is annexed to the signature of a paper purporting to be a deed, and the word "seal" is written within the scroll, and said writing is properly acknowledged and admitted to record, it must be regarded as a deed, although the scroll or seal are not recognized in the body of the instrument. So in the case of *Ashwell v. Ayers*, 4 Gratt. 283, the court of appeals of Virginia held that "an instrument purporting to convey land, with a scroll attached to the grantor's name, though the scroll is not recognized in the body of the instrument, will be held to be a deed, where the instrument has been acknowledged in court by the grantor as his deed, for the purpose of having it recorded."

Prof. Minor, in his *Institutes* (volume 2, p. 653) upon this question, says: "In instruments not required by some statute to be under seal, the scroll must be recognized as a seal in the body of the instrument, as in the case of a common bond for money;" citing *Clegg v. Lemessurier*, 15 Gratt. 108, where it is held that "a writing for the payment of money or other purpose, which is not required to be by deed, having a scroll at the foot thereof, with the word 'seal' written therein, but which is not recognized in the body of the instrument as a seal, is not a sealed instrument." In this case Judge Lee, in delivering the opinion of the court, reviews the authorities, and, referring to the case of *Ashwell v. Ayers*, 4 Gratt. 283, says: "And, as recording was essential to perfect the instrument for the purposes intended, it might be said, without impropriety, that this was part and parcel of the perfect deed, and sufficiently manifested the recognition of the writing as a sealed instrument. The distinction, then, between instruments of this character, which can only be effectual as deeds, and a promise in writing simply for the payment of money, which might be indifferently an obliga-

tion under seal, or a promissory note, and as to which neither acknowledgment before witnesses or in court, nor recording, was necessary, must be apparent."

In the case of *Smith v. Henning*, 10 W. Va. 630, Haymond, Judge, in delivering the opinion of the court, after elaborately discussing this question, and citing the case of *Taylor v. Glaser*, 2 Serg. & R. 504, and numerous other authorities, says: "In the case at bar the paper writing in question, called the 'Deed,' from Jones, the executor, to the defendant, for the land in controversy, commences, 'This indenture,' *etc.* It is signed by the executor with his name, with a scroll opposite his name, and within the scroll, opposite his name, the word 'seal' is written. In this condition the said paper writing was presented to the clerk of the County Court by the grantor therein, and, as presented with the scroll—seal and all—was acknowledged by him before the clerk. Taking the certificate of the clerk and the whole paper together, it is manifest that the grantor not only acknowledged the whole body of the paper writing, but his signature and scroll as his seal, because the word 'seal' was written within the scroll, and also that in acknowledging it before the clerk he acknowledged it as his deed, as was then understood by the clerk, as is manifest from the certificate of said clerk."

This deed has a striking similarity to the one under consideration—in fact, in every material point it is precisely the same; and, in view of these authorities cited, the paper bearing date the 12th day of July, 1877, and signed by Solomon W. Cosner, and acknowledged before William Rains, justice, and admitted to record by the clerk of the County Court of Tucker county, was the deed of said Solomon W. Cosner to his wife and children for the property therein mentioned. The effect of this conveyance was to confer upon Catherine Cosner the equitable title to the undivided one eleventh part of said land, and to convey to her ten children the remaining ten elevenths thereof.

It appears that the said Solomon W. Cosner originally owned three tracts of land, containing, respectively, five hundred and twenty four, one hundred and sixty six and one hundred and forty eight acres each, and aggregating

eight hundred and eighty eight acres. After conveying the same to his wife and children, four elevenths thereof, amounting to three hundred and four and three elevenths acres were reconveyed to him by his wife and three of his children, and then, on the 9th day of March, 1880, said Solomon W. Cosner conveyed to Emile and F. H. Cosner one hundred and sixty six acres thereof; to Melissa J. Cosner, wife of W. H. Cosner, one hundred acres thereof; and to C. C. Cosner one hundred acres thereof—and shortly afterwards, to wit, on the 20th day of July, 1880, said Solomon W. Cosner conveyed one hundred and eighty six acres of said lands to Daniel Cosner, and on the 26th day of April, 1888, said Solomon W. Cosner conveyed eighty eight acres from said lands to Mitchell Carroll and wife, all of which deeds were duly admitted to record; and the record discloses the fact that while three hundred and four and three elevenths acres of land were reconveyed to him, he has sold and conveyed to different parties six hundred and forty acres.

The plaintiffs in the original cause, so far as we can determine from the portions of the record presented, relied almost solely upon the alleged invalidity of the deed from Solomon W. Cosner to his wife and children, which reliance was based on the fact that the seal was not recognized in the body of the instrument. Having determined that this defect was cured by the acknowledgment and recordation, the next question was as to the effect of the conveyance from the husband to the wife directly, and this question was determined by reference to the case of *McKenzie v. Railroad Co.*, 27 W. Va. 306, where it was held, "a deed from a husband to his wife for real estate, while inoperative and void at law, is nevertheless valid in equity, and will confer upon the wife a good equitable estate, which, in all cases, will be enforced against the husband by a court of equity." The wife then took an equitable estate in the land, and the children a legal estate.

At the time this conveyance was made, it is alleged in the petition and undenied, that said Solomon W. Cosner was in no way indebted; that the lands conveyed by him to his wife and children were all the lands which he possessed; he has

conveyed away more land than was reconveyed to him by his wife and a portion of his children. At the time this suit was brought, it was too late to attack any of these conveyances as voluntary, and no effort appears to have been made to assail them as fraudulent. The court, however, in the decree complained of, acted upon the theory that the deed from Solomon W. Cosner to his wife and children, not being under seal, was a nullity, and the commissioner Adams—having found that, if said deed passed no title to said wife and children, said Solomon W. Cosner was at the time of his death, in 1888, the owner in fee simple of three several tracts of land, one containing two hundred and twenty one and three fourths acres, another containing one hundred and forty three and three fourths acres, and the other the mill lot—adopted this view of the case, and decreed the sale of these three tracts of land.

Having, however, reached the conclusion that the paper executed by Solomon W. Cosner to his wife and children on the 12th day of July, 1877, was a deed conveying an equitable interest in said lands to his wife, and a fee simple estate to her children, and it being apparent that in this view of the case the said Solomon W. Cosner, at the time of his death, was the owner of no real estate which could be subjected to the payment of his debts, the decree complained of must be reversed, and the cause remanded, with costs.

CHARLESTON.

DUNN'S EX'RS v. RENICK *et al.*

Submitted February 1, 1895—Decided April 3, 1895.

1. WILLS—LEGACIES—TAXES—*Res Adjudicata.*

A will directs executors to sell certain land to pay—First, a certain debt; next, a legacy to Mrs. Dunn; next, a legacy to Mrs. McNeal; and the residue of proceeds to be equally divided between them and two other children. The executors have a naked power to sell, and the legal title descends to those four children as heirs. The land sells for only enough to pay the debt and the principal of Mrs. Dunn's legacy. Taxes on the land subsequent to testa-

40	349
41	533
40	346
45	444
40	349
148	249
48	529
4	349
52	658
40	349
53	518
40	349
54	532
40	349
55	9
40	349
57	154
40	349
58	230

tor's death are paid by the executors, and in this Court, by a former decree before sale, they are held to "be entitled, as against the residuary legatees of a portion of the proceeds of said real estate, to credit for the taxes so paid." One of those children (John Dunn) is given a specific devise and legacy. *Held*, the former decree is not *res adjudicata* to fix upon any of the four residuary legatees, receiving nothing as such from the land, a liability to contribute to the payment of such taxes, either as residuary legatees, heirs, or persons.

2. WILLS—RESIDUARY LEGATEES—TAXES.

They are not liable under the will, as residuary legatees, nor by law, as heirs, for such taxes.

3. TAXES.

Taxes are not a personal debt, or in the nature of a personal debt.

WILL—TAXES—SPECIFIC LEGACY.

John Dunn is not liable for such taxes by reason of his receiving other land and personalty by specific devise and bequest under the will.

5. WILLS—TAXES—ABATEMENT OF LEGACIES.

Such taxes and commission to the executors on sale must be abated from Mrs. Dunn's legacy by crediting them on the money in the executor's hands going to her from the sale.

6. WILLS—ABATEMENT OF LEGACIES.

Demonstrative legacies are subject to abatement, but specific legacies are not.

7. JUDGMENT—FIRST DAY OF TERM.

Though a decree or judgment relate to the first day of a term, yet if the case was not ready for hearing or trial, and therefore no judgment or decree could have been given on such first day, it does not relate to the first day, but has the date of its actual entry of record.

Quære: Do all proceedings of a court relate to the first day of a term?

Quære: Does computation of time limiting a bill of review begin at the first day of the term, or at the date of actual entry of the decree?

8. BILL OF REVIEW.

A bill of review must state substantially the former bill or bills, the decrees and proceedings thereon, including the decree complained of, and the point wherein the party filing it is aggrieved.

9. BILL OF REVIEW—ERROR OF LAW—DEPOSITIONS.

On a bill of review for error of law, that error must be collected from the pleadings, and exhibits filed with the pleadings and orders and decrees, and must be made out on facts admitted in the pleadings, or stated in the decree as facts found. The depositions can not be looked to. An error of the court in reaching a wrong

conclusion as to facts upon the evidence is not correctible by bill of review, but by appeal.

10. BILL OF REVIEW—ERROR.

No one can correct, either by bill of review or an appeal writ of error, an error not aggrieving him.

11. WILLS—EXECUTOR'S SALE.

A will directs a sale of land by two executors. One only is present at the public auction, but the other consented that his co-executor make it, and ratifies and approves it. The sale is not invalid on these facts.

12. WILLS—BILL OF REVIEW—EXECUTOR'S SALE.

A will directs a sale of land by two executors. Before sale the executors bring a suit in equity to construe the will and administer the assets, making all persons interested parties, and in it decrees are made directing a sale of land by both or either of the executors. A sale is made and confirmed, and a bill of review is filed for reversal of the decree of confirmation. If there were error in the first decree, in giving power in either executor to sell, that decree being appealable and final, and relief against it by bill of review or appeal barred by limitation, reversal of the decree of confirmation would not affect it. It could not be reached by bill of review, and a sale by one executor under it would be valid, and beyond reach by such bill of review.

13. BILL OF REVIEW—SUPREME COURT OF APPEALS.

No bill of review for error of law will lie to a decree of the supreme court of appeals.

Can one of two executors sell land under a will?

A. C. SNYDER for appellants, cited 33 W. Va. 476, 480, 481, 482, 483; 19 Gratt. 438; 78 Va. 215; 15 W. Va. 732, 766; 16 W. Va. 32.

BROWN, JACKSON & KNIGHT for appellee, John R. Dunn, cited 2 Lomax Ex'or, side p. 152; 33 W. Va. 476; 67 Md. 498; 16 Pa. St. 275; 1 P. Wm. 779; 2 Ves. 194; Rop. Leg. 456; 18 W. Va. 441; 16 W. Va. 32.

J. W. ARBUCKLE for appellees, cited 33 W. Va. 476; 10 W. Va. 130; 78 Va. 223; 19 Gratt. 473; 15 W. Va. 767; Code, p. 123; 21 W. Va. 777; 33 W. Va. 430; 12 W. Va. 394.

BRANNON, JUDGE:

John W. Dunn died leaving four children—Lizzie J. Renick, Kate V. McNeal, John R. Dunn and Henry C. Dunn.

By his will he gave a tract of land called the "Home

Place" to John R. Dunn, and certain personalty. He directed the sale of a storehouse in Lewisburg, and that out of its first proceeds there should be paid to his daughter Kate V. McNeal one thousand dollars, and that the residue go to John R. Dunn. He gave to a servant fifty dollars. He gave to Lizzie J. Renick an indebtedness against her husband. And he directed that his executors, at such time as they should judge would promote a sale for the largest price, should sell certain land in Kanawha county, and that out of its first proceeds they pay certain indebtedness (about three thousand dollars) of his son Henry C. Dunn, and secondly pay seven thousand dollars to Sallie P. Dunn, wife of Henry C. Dunn, upon certain trust; and he directed that out of a fund formed from the residue of the proceeds of sale of the Kanawha land and the collection of debts due him, his executors pay, first, seven hundred and thirty five dollars to Kate V. McNeal, and that its residue be equally divided between Lizzie J. Renick, Sallie P. Dunn, John R. Dunn and Kate V. McNeal.

The Kanawha land remained unsold for nearly seven years after the testator's death, and when sold brought ten thousand dollars only—just the amount given by the will for payment of indebtedness of Henry C. Dunn and the legacy to his wife, Sallie P. Dunn. In the interim between the death of the testator and the sale, taxes on this Kanawha land were paid by the executors.

Some five years after the testator's death the executors brought this suit in the Circuit Court of Greenbrier county to have the will construed and for other purposes; and the case once before came to this Court, and the decision then made will be found in '33 W. Va. 476 (10 S. E. Rep. 810). This Court then decided that the taxes so paid should be refunded the executors. When the case went back to the Circuit Court from this Court, a further executorial account was stated, and a balance was ascertained to be due the executors of one thousand six hundred and ninety nine dollars and fifteen cents, made up of taxes paid by them on the Kanawha lands, the commission to the executors on its sale, and costs in this suit. The Circuit Court decreed that the

executors, out of money arising from the sale of the Kanawha land, retain the said balance found due them, which operates to make the legacy to Sallie P. Dunn pay the whole of it, by abating it that much. Henry C. Dunn and Sallie P. Dunn appeal.

For them it is contended that such balance in favor of the executors is chargeable equally on the four persons who are the legatees of any residuum which might remain from the sale of the Kanawha land after paying the ten thousand dollars given to pay, first, the indebtedness of Henry C. Dunn, and next the legacy to Sallie P. Dunn, and next the legacy to Kate V. McNeal, and that as two of them (Mrs. Renick and Mrs. McNeal) are insolvent, it ought to be paid by Sallie P. Dunn and John R. Dunn. It is claimed that this is enexorably so, by reason of the former decision of this Court; that it is *res adjudicata* as to this.

Let us see as to this. This Court, in its former decision in the case, held "that the executors had a naked power to sell, without any title vested in them, but that title vested in the four children, as heirs, and that if the heirs permitted the land to be returned delinquent for taxes, and the executors to prevent the loss of the land, paid taxes, they would be entitled as against the residuary legatees of a portion of the proceeds of said real estate, to credit for the taxes so paid." Judge Snyder, in the opinion, said: "The title to this farm descended to and vested in the heirs, subject to the naked authority in the executors to sell it in the manner prescribed by the will. The heirs (that is, the four children of the testator) were liable as the owners, for the taxes on the farm. * * * If it was not the duty of the executors to preserve the farm by paying the taxes, it is certain that the heirs can not justly complain that they, in good faith, under a belief that it was their duty to do so, did what the heirs neglected to do. The payment of these taxes was for the benefit of the estate, and, those entitled to the residuum being those whose duty it was to pay them, it is entirely equitable that the executors should be credited with the amount, as against the residuary legatees for whose benefit the payment was made."

This holding of the court, as explained by this quotation from the opinion, makes the foundation on which rests the plea of *res adjudicata*. Now, at the date of that decision the land had not been sold. It could not then be foreseen what it would sell for, or whether there would be or would not be any balance, after paying the ten thousand dollars given to Henry C. Dunn's debts and his wife, Sallie P., and Mrs. McNeal, to go to the residuary legatees. When sold, it brought just enough to pay that ten thousand dollars, without interest, leaving nothing to go to the residuary legatees. Did the Court mean to say that the four residuary legatees should each pay one fourth of the taxes on the land, whether they should receive anything from it or not? Had the sale left a balance to go to them, clearly these taxes should be paid out of that balance, because the said ten thousand was payable first, Mrs. McNeal's legacy of seven hundred and thirty five dollars next, and these legacies ought to be paid net, clear of abatement for taxes, and the four children get only the balance, they being legatees of only a residuum. That is what the Court meant; but when there is no residuum to go to them, and they get not a cent, where is the reason for charging the taxes to them? The fact of this deficiency was not before the Court, because non-existent when it rendered that decision. The Court only meant to charge the residuary legatees with taxes, in case they received anything as such legatees. If we charge them, on what theory shall we base the charge? Shall we say these four children were heirs, and liable for the taxes? They, as heirs, held only the dry legal title, without substantial interest, because they held subject to the power of sale to answer certain purposes. They should not pay simply as heirs, receiving nothing as heirs. The taxes could create no personal obligation, as heirs, upon them. Taxes are not a debt, or in the nature of a debt. *Board of Education of Cabin Creek Dist. v. Old Dominion I. M. & M. Co.*, 18 W. Va. 441. When Judge Snyder said the heirs, who were the residuary legatees also, were liable for the taxes, he said so because at that date they had an apparent, probable interest; but he never contemplated or intended to decide the liability

for those taxes, as between Sallie P. Dunn and the other residuary legatees, upon the basis of there being no residuum for distribution. And observe that Judge Snyder said the executors would be entitled to have the taxes "credited as against the residuary legatees for whose benefit the payment was made." The very word "credited" supposes something going from the executors to the residuary legatees. A sum can not be credited when there is nothing on which to credit it. And it is to be credited "against the residuary legatees for whose benefit the payment was made." For whose benefit was it made? At date of payment it was apparently, or might be, for all the four children, though first and foremost for Mrs. Sallie P. Dunn's benefit, she being the preferred legatee; but, as it turned out when the sale was made, it was for her sole benefit. Now, the decision says it must be "credited" in favor of the executors on the fund in their hands arising from the sale, and, as there is no fund in favor of the residuary legatees, it follows that it must be abated from Sallie P. Dunn's legacy. So, this former decision, logically applied to the facts as they now exist, is stronger, as a matter of *res adjudicata*, in favor of, than against, the decree complained of. Never did the Court think of saying in the former decision that those residuary legatees should be bound to pay those taxes as a matter of personal obligation. Yet that is what is proposed to be deducted from that decision. The simple fact that the balance due the executors should be "credited" upon what was expected to come to their hands for distribution among the residuary legatees absolutely repels and negatives all idea that the legatees were to be personally bound, or pay otherwise than by abatement from what should be coming to them. The record, as then before the Court, inspired a reasonable expectation that there would be a residuum, as the valuation placed on the land was largely in excess of what it finally realized.

Is it because of their character as residuary legatees that they should pay? They never became such. They received nothing as such. Had they taken anything they would have taken it subject to the burden. It is not possible that their mere nomination in the will as residuary legatees would im-

pose a personal responsibility. No more would it do so than if they were strangers to the will. Neither Sallie P. Dunn, nor any one else, is liable as residuary legatee, as there is no residuum; but because the executors are entitled to a refundment of the taxes, there being no other assets to pay them, and they having been spent for this land, there comes a necessity to abate them from her legacy. None of the four have any relation to a residuum, there being none.

It can not be thought for a moment that John R. Dunn is to be charged because he was devisee of another tract of land and legatee of certain personal property, because that devise and that legacy are specific in character. A specific legacy is liable to ademption, but not to abatement. The legacy payable to Mrs. Dunn out of the sale of the Kanawha land is a demonstrative legacy, and subject to abatement; and surely Mrs. Dunn can not, as owner of a demonstrative legacy, call on John R. Dunn, the owner of a specific legacy and devise, to relieve her legacy from abatement or loss from these taxes and commissions, but must suffer the abatement alone. John R. Dunn gets his specific legacy and devise without abatement, whether Mrs. Dunn gets her legacy or not. *Morris v. Garland*, 78 Va. 215; *Bradford v. McConihay*, 15 W. Va. 766; 2 Lomax, Ex'rs, p. 69, c. 1, § 3; 2 Redf. Wills, p. 456, c. 13, § 7, subsecs. 1. 9. This is especially so, seeing that the cause of abatement is taxes on the Kanawha land itself, and subsequent to testator's death. A decree against those legatees can not be warranted on the idea that the executors have overpaid beyond assets, as all the facts to justify that theory are not present, and especially as this payment was on account of this particular land, and after testator's death. An executor can not recover a voluntary payment to a legatee when deficiency appears. *Davis v. Newman*, 2 Rob. (Va.) 664; 2 Lomax, Ex'rs 173; 1 Rep. Leg. 456.

It is urged in argument that the testator intended to make his children equal; that what was given to John R. Dunn, and the ten thousand dollars given for the debts of Henry C. Dunn and the legacy to his wife, Sallie P., were at the death of the testator equal, but that John R. Dunn occupied his

farm from the testator's death, while Sallie P. Dunn did not realize her legacy for nearly seven years, when the sale of the Kanawha land was made; and that this inequality somehow calls upon John R. Dunn to share the burden of the balance due the executors. I do not see that the accidental circumstance of delay of the sale should produce this result, even were there no other facts here to come in, if we are to consider circumstances of equity. But Sallie P. Dunn and husband during those years occupied and derived support from the Kanawha lands, without rent, which is reported by the commissioner to be worth one thousand two hundred dollars per annum—more than interest on her legacy, and more than interest on what was given John R. Dunn, and certainly as great as the yearly value of what John R. received. And John R. Dunn is not responsible for delay of sale. That was a matter with the executors; and not only John R. Dunn, but Sallie P. Dunn and her husband, objected to a proposed sale at a much larger sum than was finally realized.

It is said that the taxes were a debt made for the benefit of the estate. But it was not, but simply for the benefit of the owners of the Kanawha land, turning out to be Sallie P. Dunn alone. There is no obligation in John R. Dunn to contribute to it as a debt before the death of the testator. And, besides, he was a specific devisee and legatee.

It is said that the delay of sale, and consequent accrual of taxes, could have been avoided at any time by the turning over to Sallie P. Dunn, by the others interested, of the Kanawha land. They expected, as did Sallie P. Dunn and her husband, that the land would bring more. Is it reasonable or just to visit upon them a penalty for not giving up a fair chance of realizing something from this land? Is the omission to do so at all pertinent? If we compare default of duty between the children, we should rather expect Sallie P. Dunn to pay the taxes, as she was in possession, receiving large rents and profits from houses on it and from support, and had the largest interest to save it, as legatee. The tenant is liable in the first instance for taxes, though the landlord is ultimately, and the tenant may deduct them

out of rent. 1 Tayl. Landl. & Ten. §§ 341, 395; Code, c 30. ss. 9, 15. But she paid no rent. Why is it inequitable to charge her with taxes? So, I conclude that the taxes, and *a fortiori* the commission on sale, should be abated from the proceeds of sale in the hands of the executors, as the court below decreed, and that John R. Dunn and Mrs. Renick and Mrs. McNeal can not be made to pay any part thereof. Certainly the commission on the sale should be deducted from the proceeds of the land.

Another question arises in this case, and an important one, not only in this case, but in general practice. I can but regret that we have not any argument of counsel or citation of authority on this important point, and I have myself been unable to find pointed authority upon it. The appellees tendered a bill of review to reverse the decree confirming the sale, and to set aside the sale and it was dismissed as tendered too late, and a brief of counsel for appellees asks us to reverse the action of the court in dismissing the bill of review. The decree sought to be reversed by the bill of review was actually entered June 30, 1890, and the bill of review was entered July 1, 1893. By Code, c. 133, s. 5, a bill of review must be filed "within three years next after such decree." Shall we, in the computation of time, exclude the 30th day of June, 1890? I think it must be excluded. Section 12, chapter 13, Code, enacts, as a general rule in the construction of statutes, that "the time within which an act is to be done shall be computed by excluding the first day and including the rest." The statute limiting prosecutions of misdemeanors uses the same words, "next after," used in the limitation for bills of review; and in *State v. Beasley*, 21 W. Va. 777, it was held that where an offense was on June 3, 1878, and the indictment June 3, 1879, the day of the commission of the offense must be counted out, under the statute, and that the indictment was in time. I think this would be so without the statute, though there has been much controversy on this apparently simple question. 1 Rob. Prac. 422; *State v. Beasley*, 21 W. Va. 780; Aug. Lim. §§ 46, 50. Thus far the bill of review is not barred.

But another question arises, which brief of counsel raises

—the important one, on which we are without help from the briefs filed by counsel. While the decree was actually entered June 30, 1890, the term of court began June 23d. It is contended that we must begin to compute time against the bill of review from June 23, 1890. This is practically an important question. When do you commence to compute time against a bill of review, or writ of error or appeal, or petition of a non-resident for rehearing, and in other instances that may occur in practice? What is the date of rendition of a decree or judgment, the first day of the term, or the date of actual entry of record? I incline to think the date of actual entry has been used in practice. It is strange that though works on appeal discuss the subject of limitation of appeals, and limitations generally, they do not just meet this point. I have found nothing exactly upon it. "The term of a court is in legal contemplation as one day, and, though it may be open many days, all its acts refer to its commencement, with the particular exception in which the law may direct certain acts to be done on certain other days. It is seldom necessary that the day of any proceeding should appear, in making up the record, distinct from that of the beginning of the term, though a minute may be kept of each day's doings. Nor is it necessary that there should be adjournments from day to day, after the term is once opened by the judge; nor, if there should be, that they should be recorded, in order to preserve the authority of the court to perform its functions. The court may in fact not adjourn during the whole term, but be always open, though, for convenience of suitors, an hour of a particular day, may be given for their attendance. If the record state the time of doing an act, as the statement is unnecessary, so it is harmless surplusage, unless the day be beyond the period to which the term legally extends." So said the Supreme Court of North Carolina in *State v. Martin*, 2 Ired. 122. I think it a correct statement of the law, as the common-law certainly considers a term of court, though running over divers days, one day. 1 Lomax, Dig. 287.

Justice Tucker said in *Dew v. Judges*, 3 Hen. & M. 27: "The term 'session,' when applied to courts, means the whole term;

and in legal construction the whole term is construed as but one day, and that day is always referred to the first day, or commencement of the term." I hardly think that because our statute contemplates adjournment from day to day, and provides that each day's proceedings shall be separately recorded and signed by the judge, it cuts up the term into separate days, and individuates each day from another, and changes the common-law rule.

By reason of this rule that the whole term is one day, the common rule was that a judgment rendered on any day has relation to, and is a judgment of, its first day. Tidd, Prac. 547; 1 Lomax, Dig. 287; 1 Black, Judgm. § 441; 2 Freeman. Judgm. § 369; *Farley v. Lea*, 32 Am. Dec. 680. This doctrine or rule had been always recognized in Virginia before we had a statute, but is now embodied in a statute, as regards the effect of the judgment as a lien. Code, c. 139, s. 5; *Society v. Stanard*, 4 Munf. 539; *Coutts v. Walker*, 2 Leigh 268; *Skipwith v. Cunningham*, 8 Leigh 272; *Withers v. Carter*, 4 Gratt. 418 (Baldwin, Judge).

While this is settled as to judgments, I had some question as to the interlocutory acts of courts generally, though they would seem to fall under the general rule. In *Foust v. Trice*, 8 Jones (N. C.) 490, it is stated that all acts of court, by relation, stand as if done on the first day, and it was held that an order of continuance related to the first day. A plea has been held to be a plea as of first day. Opinion in *Pope v. Brandon*, 20 Am. Dec. 49; note to section 442 of 1 Black, Judgm. But this was a final decree, and, in this regard is to be deemed a judgment. But this fiction of relation of judgments to the first day of a term is not without exception. It applies to cases where the judgment could have been rendered, but not to a case where it could not have been rendered, as where on the first day the case was not in condition for judgment. *Wynne v. Wynne*, 1 Wils. 42; *Swann v. Broome*, 3 Burrows 1596; *Coutts v. Walker*, 2 Leigh. 278; *Withers v. Carter*, 4 Gratt. 416, 418; *Brown v. Hume*, 16 Gratt. 465; *Yates v. Robertson*, 80 Va. 475.

Now, this case was not in a condition to warrant a decree of confirmation of sale until June 30th, as no report of sale

was filed till then, so far as the record shows, and there could not be such a decree without such report. Hence we can not commence to compute time from the 23d of June, and in no view was the bill of review barred. The court gave that as the reason for dismissal, but the action of a court may be stated to be on an insufficient reason, and yet be right for a different reason. The reason given is immaterial, and the question in the appellate court is, is the decision, for any reason, correct? Opinion in *Henry v. Railroad Co.*, 40 W. Va. 234 (21 S. E. Rep. 863); *Shrewsbury v. Miller*, 10 W. Va. 115. Then, is the dismissal of the bill of review, for any reason, correct? It is not based on newly discovered matter, but on error of law apparent on the decree of confirmation. In the first place, I think it is demurrable. It does not recite, or even refer to the bill, the basis on which the superstructure or proceedings stand, and does not tell the court what proceedings had been had therein save that a decree had been pronounced confirming a certain sale, which presupposes a prior decree or decrees, and does not comply with the law of equity pleadings regulating bills of review. *Amiss v. McGinnis*, 12 W. Va. 371; Story, Eq. Pl. §§ 420, 638.

One ground for relief which it assigns is that an attorney for Sallie P. Dunn and her husband, in the case, attended the sale, and bid in the property for her, so announcing, and that this had the effect to prevent bidding, and that a report of sale to her was filed, and delivered to the judge for action, but before decree it was modified so as to show the attorney as the purchaser, and was so confirmed. This is said to be error of law—to confirm a sale to an attorney of the parties. Without inquiry as to whether this fact of the relation of the attorney and client is a fact so appearing on the face of the decree as to warrant a bill of review, I will say that it is only the clients of the attorney who have cause of complaint. What matters it to the parties filing the bill of review that the purchaser was an attorney of hostile parties? It is only because of the fiduciary relation to his clients that the attorney can not purchase. The act is only voidable on the objection of his clients. *Newcomb v. Brooks*, 16 W. Va. 32. A person

can not complain of an error by bill of review, unless it aggrieves him, any more than he can by appeal or writ of error. *Laidley v. Kline*, 25 W. Va. 211. Mere error, not aggrieving a party, will not reverse. *Fant v. Lamon*, 27 W Va. 229. And the act being only voidable, at the election of the client, it would not be ground of a bill of review or error, but the subject of an original bill, even at their instance.

Another point of error alleged in the bill of review is that the will empowered two executors to sell, whereas one only made the sale. On this point the question arose in my mind as to what parts of the record we can look to in solving it. If we can look only to the decree of confirmation—the only one mentioned in the bill of review—we find that its language negatives the allegation of the bill that the sale was made by one only of the executors, as it recites that the case was heard on the papers before read, and “the report of sale made by the plaintiffs,” and both were plaintiffs. To sustain this allegation, we must look at something else. Can we look at the report of sale, and other decrees? There is confessedly difficulty and confusion, at least, in practical application of the rules on this subject. As the rule is stated in Story, Eq. Pl. § 407, to sustain a bill of review for error of law apparent on the face of the decree, you must not find it by looking into evidence, but, taking the facts as stated on the face of the decree, you must find the error there, or not at all; that is, you can look to the decree only, and thus, if the facts are not set out in it, a bill of review does not lie. The practice in England, where the rule originated, was to set out the facts found by the court from the pleadings and evidence. As thus limited, the ground for a bill of review, under our practice, has narrow scope; for our practice, and I think the proper one, is not to detail the facts found true by the court in a decree, but after bringing the cause on upon the various pleadings, exhibits, depositions, *etc.*, essential to a full presentation of the facts, to simply decree the relief given. But I think at present the rule is broadened; that is, the scope of a bill of review. You can not look to depositions, nor can you correct an erroneous finding or decision of fact on the evidence, which you can only do

on appeal; but you can look to the bill and other pleadings, and to all decrees and orders. I repeat: You can not look to evidence; you can not find fault with the decisions of facts by the court, and turn to the depositions or other evidence to prove it wrong; but you can look to all the pleadings on both sides, and take the facts in them admitted, or the facts stated in the decree as facts found by the court, and upon those facts show that the decree is wrong in law. You can inspect the pleadings and their exhibits, consider the facts therein admitted, and inspect all decrees, orders, or proceedings, and take the facts in them stated by the court as facts found by it, and show from them that the decree is, in law, erroneous. If there be error in the decree, and you can show it by the record thus limited, you can cure it by bill of review in the same court which pronounced the decree; otherwise, you must seek relief from that error by appeal. *Thompson v. Edwards*, 3 W. Va. 659; *Nichols v. Nichols' Heirs*, 8 W. Va. 174; *Rawlings v. Rawlings*, 75 Va. 76, 88; *Thomson v. Brooke*, 76 Va. 160; *Hancock v. Hutcherson*, *Id.* 609; *Bart. Ch. Prac.* 3334; *Core v. Strickler*, 24 W. Va. 697.

Under these principles we can look to the report of sale, I think, to support the bill of review. It shows that only one of the executors was present at the sale, but the other recognized and approved the sale by uniting in the report. Now, it may be—likely is—true that if one executor had acted throughout alone in the sale, without approval, his act would be void as an act under the will, which conferred a mere naked power, and that joint. *Johnston v. Thompson*, 5 Call. 248; *Deneale v. Morgan*, *Id.* 407; 1 Lomax, Dig. 362; 2 Pow. Dev. 294; *Brown v. Hobson*, 13 Am. Dec. 187; *Floyd v. Johnson*, *Id.* 255. It can hardly be that a sale would be set aside merely because both were not at the auction; so he concurred in the act by ratification. And, besides, a decree in the case authorized either or both the executors to make the sale. Even if that decree were erroneous, in departing from the will in providing for an execution of the power by one, it would be good until reversed. The court had the will, the property, and all the parties before it, for construction of the will, for its execution, and the administration of

assets under it, and I would hesitate long to say, even on appeal, it was for this cause erroneous. But there it stands, valid, and vindicates the sale by one executor. It was an appealable—indeed, a final—decree. *Core v. Strickler*, 24 W. Va. 689. Relief against any error in it was barred by time against an appeal or bill of review, when the bill of review was filed. Therefore, even on appeal from the subsequent decree of confirmation, no error in the former decree could be corrected, as on appeal from a later decree there is no right to reverse prior decrees, appealable, rendered more than the statutory period prior to the taking of the appeal. *Tiernan v. Minghini*, 28 W. Va. 314. Therefore, this bill of review could not possibly reach the decree authorizing a sale by one of the executors, and, as it stood firm, even a sale by one would be good and irreversible. And, as just occurs to me, that decree authorizing both or either to sell was affirmed by this Court; and there can be no bill of review for error of law to a decree of this Court, or a decree affirmed by it. *Henry v. Davis*, 13 W. Va. 231. Moreover, the court is the seller. It could confirm on a report by one, even if it had jointly, and only jointly, authorized two to act. The commissioner only receives bids, in place of the court. Such a matter is considered only on confirmation. Judge Snyder said a court could ratify a sale even by one not authorized to make it, and based this statement on *Freem. Jud. Sales*, § 42. See *Core v. Strickler*, 24 W. Va. 697. This because the court is the seller. He said, as I say in this case, it is not such an error as would be ground of reversal, in absence of evidence of actual prejudice to the party from it. I can not see how it prejudices the party, whether one or both cried the property, or were present at the sale. It does not appear affirmatively that there was prejudice to the parties complaining, and this irregularity is no ground for setting aside the sale. *Core v. Strickler, supra*.

For these reasons, I think there is no error in dismissing the bill of review, taking that bill on the case presented by itself. With a modification in a matter of costs charged to Sallie P. Dunn, the decree is affirmed.

CHARLESTON.

HOUSTON v. McNEER.

Submitted January 31, 1895.—Decided April 3, 1895.

40	365
42	306
40	365
48	558

1. ASSIGNMENT OF BOND—WITHOUT RECOURSE—FALSE REPRESENTATION.

The plaintiff took from the defendant a written assignment without recourse of a bond on M., and sued to recover his money back on the ground of fraudulent representation. To avoid such contract, the representation must be of a material fact, and be false within the knowledge of defendant, and be made with intent on his part that plaintiff should act upon it, which representation the plaintiff, in ignorance of its falsity, relies upon, and is thereby misled to his injury and damage.

2. ASSIGNMENT OF BOND—WITHOUT RECOURSE—PAROL EVIDENCE.

Such written assignment without recourse can not be changed in its terms by parol evidence.

3. ASSIGNMENT OF BOND—WITHOUT RECOURSE.

By such contract the assignee takes upon himself all risks of collecting the money, provided the instrument assigned was in fact what it seemed to be—a genuine, valid, subsisting debt.

4. ASSUMPSIT—EXPRESS WARRANTY.

General *indebitatus assumpsit* does not lie for the breach of an express contract of warranty.

A. F. MATHEWS and JOHN OSBORNE for plaintiff in error, cited 25 W. Va. 285, 286; 2 Rob. Prac. (New) 449, 450, 454, 466.

JOHN W. HARRIS for defendant in error, cited 25 W. Va. 543; 19 W. Va. 438; Big. on Fraud p. 466; 2 Rob. Prac. (New) 274; 2 Pars. Bills & Notes 21; 27 Gratt. 878.

JOS. D. LOGAN for defendant in error, cited Greenl. Ev. (14th Ed.) § 275 *et seq.*; 30 Gratt. 272; 16 W. Va. 651; 6 Gratt. 633-34; 13 Gratt. 705; 27 Gratt. 878; 2 Hen. & Mun. 189; 6 Leigh 230; 1 Pars. Conts. 263; 3 Min. Inst. 406; 1 Rob. Prac. 477; 9 Leigh 473; 5 B. Mon. 402; 31 W. Va. 428.

HOLT, PRESIDENT:

This was an action of *indebitatus assumpsit* in the Circuit

Court of Monroe county, tried on plea of *non assumpsit*; verdict for defendant; verdict set aside; again tried, and verdict for defendant, which the court refused to set aside, but gave judgment, to which this writ of error was allowed the plaintiff.

The declaration contains the common counts, including the count for money had and received, concluding with a special count in *indebitatus assumpsit*, as follows: "And for that the said defendant on the——day of——, 1886, assigned to the said plaintiff, for valuable consideration, to wit, four hundred and fifteen dollars, then and there paid to the said defendant by the said plaintiff, a certain note for the sum of four hundred and ninety nine dollars and forty five cents, executed to the said defendant by one R. T. McNeer on the 7th day of January, 1886, and due and payable on demand; and the plaintiff avers that at and before the said assignment the said defendant told the plaintiff, and represented to him, that he, the said defendant, was not indebted to the said R. T. McNeer in any way; that there were no offsets to the said note; that the said note was then immediately collectible, and that no objection could be made by the said R. T. McNeer to its immediate payment; that in consideration of said representation the plaintiff took the said note without recourse. And the plaintiff further avers that the said statements and representations were untrue, and well known so to be by the defendant; that the defendant was at the date of the said assignment, and afterwards, indebted to the said R. T. McNeer to an amount greater than that of the said note, so that the said R. T. McNeer refused to pay the said note on account of the said indebtedness, when thereunto afterwards requested by the said plaintiff, and that it would have been a vain thing for the said plaintiff to have sued the said R. T. McNeer. And the plaintiff avers that, by reason of the said false statements and representations, the said plaintiff suffered loss to the amount of the said sum of money paid to the said defendant; and the said defendant became liable to pay to the plaintiff the said sum, with the interest due thereon. And the said defendant, afterwards, in consideration of the prem-

ises, respectively promised to pay the plaintiff the said sums respectively upon demand."

The bond assigned by defendant, McNeer, to plaintiff, Houston, with the assignment thereof, without recourse, is as follows: "On demand, for value received, I promise to pay A. A. McNeer the just and full sum of four hundred and ninety nine dollars and forty five cents. Witness my hand and seal this seventh day of January, 1886.

"R. T. McNEER (Seal.)

"Assigned without recourse.

"A. A. McNEER,

"A. C. HOUSTON."

The only witnesses examined were plaintiff and defendant on their own behalf. Plaintiff's evidence tends to prove that the debtor, R. T. McNeer, was insolvent. He bought the note for the purpose of letting R. W. Bobbitt have it, who was indebted to R. T. McNeer, but such object was not made known to defendant. Plaintiff agreed to take the note if no objection of any sort could be made to its immediate payment and defendant told him that no objection at all could be made to its immediate payment, that R. T. McNeer owed him (defendant) still more besides the amount of that note. Thereupon plaintiff took it without recourse with that understanding, and let Bobbitt have it in the same way. Bobbitt offered the note in part payment to R. T. McNeer in his settlement with him, but R. T. McNeer refused to take it. Plaintiff then took it back from Bobbitt, and wrote to defendant, A. A. McNeer, about the matter, who came to see plaintiff about it. Plaintiff told him that he took it with the understanding that no objection could be made to its immediate payment; that if he had known about the Calder land matter, he would not have taken it; and that defendant must take it back, which he refused to do.

The Calder land matter seems to have been a debt due to a commissioner who had sold the Calder land under a decree of court, which, as appears from argument of counsel, had been bought by R. T. McNeer at such sale; and the sale, by agreement of the commissioner and all interested, had been turned over to defendant, A. A. McNeer, and one John H.

Shrader, who, with the consent of the commissioner, assumed the payment of the purchase money, relieving R. T. McNeer from the payment thereof.

Defendant's evidence tended to prove that plaintiff agreed to take an assignment of the note without recourse, at a discount of ninety dollars; that he did not know what plaintiff wanted with it; did not tell plaintiff that no objection could be urged to its immediate payment; that plaintiff did not ask anything of the kind; that he did not owe R. T. McNeer anything at the time of the assignment, but R. T. McNeer owed him more than six hundred dollars over and above the note at the time he assigned it to plaintiff; and that the Calder land matter was paid, or about paid, when he assigned the note. R. T. McNeer was not sued on the note.

Plaintiff asked the court to give the following instructions, Nos. 1 and 2, to the jury. The court refused and plaintiff excepted. No. 1: "If the jury believe from the evidence that the defendant, A. A. McNeer, represented to the plaintiff, as an inducement to the contract of assignment, that he (the defendant) was not indebted to R. T. McNeer, while at the same time he was so indebted—then the jury must find for the plaintiff." No. 2: "If the jury believe from the evidence that, as an inducement to the contract of assignment, the defendant told the plaintiff that there could be no objection on the part of R. T. McNeer to the immediate payment of the note assigned, while at the same time there were unsettled transactions between the defendant and R. T. McNeer which would prevent the immediate payment of said note by said R. T. McNeer, then the jury must find for the plaintiff."

On motion of defendant, and against plaintiff's objection, the court gave the jury the three following instructions, and plaintiff excepted: Instruction A: "The court instructs the jury that if they believe from the evidence that, in the spring of 1886, plaintiff and defendant entered upon a negotiation for the sale and assignment of the bond from R. T. McNeer to A. A. McNeer, offered in evidence in this cause, and that the result of said negotiation was the written agreement upon the back of said bond, signed by the plain-

tiff and defendant, then the legal effect of said written agreement is that if said bond was due and unpaid at the time of said agreement, the plaintiff, Houston, took upon himself the risk of collecting said bond, and the terms of said written agreement can not be changed or altered by parol evidence." Instruction B: "The court instructs the jury that if a bond is assigned without recourse, it exempts the assignor from all liability by reason of the insolvency of the maker of the bond." Instruction C: "The court instructs the jury that if a party takes a bond by assignment to him without recourse, and the amount of money called for by the bond is due at the time of the assignment, he is not entitled to recourse said bond because of any failure or inability on his part to make the money called for by the bond."

The action was not a special *assumpsit* on the representation treated as an express collateral contract of warranty, in which the fraud and deceit would have been immaterial; such contract of warranty is not made the ground of plaintiff's claim of the right of recovery; but it is an action of general *indebitatus assumpsit*, with a special statement in the last count of a legal liability growing out of and resting upon a representation, false within defendant's knowledge, made by him to plaintiff, that he (defendant) was not in any way indebted to R. T. McNeer, the maker of the note assigned; that there was no set-off to it; and that no objection could be made to its immediate payment—upon which plaintiff relied, and by which he was misled, to his injury and to his damage; and in no case in which general *assumpsit* is brought, though there may have been a special agreement, does the plaintiff legally ground his claim at all upon the special agreement or promise (or warranty) nor derive any right from it, nor make it any part of his case. He proceeds exclusively upon the implied legal engagement or obligation. See *Cutter v. Powell*, 2 Smith Lead. Cas. (8th Ed.) pt. 1, p. 48. Whenever, therefore, the plaintiff brings general *assumpsit*, he grounds his claim, not on the special contract (see *Robinson v. Welty*, this term, 40 W. Va. 385 (22 S. E. Rep. 73) but upon an existing precedent debt or liability; and this suit, therefore, can not be treated as a suit for the breach of the

contract of warranty if the representation be so regarded, but upon the proof of the tort which creates the legal liability. *Huffman v. Hughlett*, 11 Lee 549; Keener, Quasi-Cont. 207. See *Catts v. Phalen*, 2 How. 376. It may be that the plaintiff would have had the right to treat the contract of assignment as rescinded on account of its fraudulent procurement, and recover back his money in general *assumpsit*, on the count for money had and received, without proof of the *scienter* or guilty knowledge on the part of the defendant; but that question does not arise in this case. See 1 Bigelow, Frauds 520, 413.

To avoid a contract on the ground of misrepresentation. (1) the representation must be false; (2) known to be so by the person who makes it; (3) ignorance of its falsity on the part of the one to whom made; (4) with the intent on the part of the maker that it shall be acted on; (5) and the one to whom made must act upon it to his injury. See 1 Bigelow, Frauds, p. 466; *Wamsley v. Currence*, 25 W. Va. 543; *Crislip v. Cain*, 19 W. Va. 438; Bish. Cont. § 650. The representation must be as to a material fact, false to the knowledge of the maker, not known to be false by the plaintiff, who, relying upon it, has been misled to his damage.

Neither of the instructions asked for by plaintiff is based upon such a supposed state of facts as would vitiate the contract of assignment, and thereby entitle plaintiff to recover back the purchase money; and both were therefore properly refused; nor is such a state of facts shown by the evidence, certainly not by such a clear and decided preponderance against the finding of the jury as would justify the court in setting aside their verdict.

Plaintiff took the risk of insolvency. It is not pretended that the note is not genuine or had been in fact paid; only that the maker of the note claimed to have some set-off or counter-claim as the ground of his refusal to pay the assignee. But how are we to know that there was any such effectual counter-claim? Defendant, in his evidence, says there was none. There is no proof clearly showing the existence of any valid set-off against the note assigned. It is true there is some evidence about a land debt due from

A. A. McNeer and John H. Shrader to a commissioner of the court for what is called the "Calder Land;" but the evidence about it is indefinite and obscure. There is certainly nothing to show it to be a legal off-set. From what does appear the conjecture would rather be that it was not; and besides, defendant says that it had been settled. The plain and reliable test was a suit at law against the debtor, which the plaintiff declined and refused to bring. See 1 Tuck. Comm. pp. 337, 338. It is said that would have caused delay, and have rendered it useless for the purpose for which it was bought, *viz.*: to let Bobbitt have it to pay his debt with. But no such purpose was made known to the defendant, nor does any testimony, written or verbal, show that particular use of it to have been one of the terms or conditions of the assignment.

The question remains, was there any error to the prejudice of the plaintiff in the instructions given at the instance of the defendant? These three instructions construe the written contract of assignment, and give to the jury instructions as to its legal effect. Is not that a matter of law, and as such clearly within the province of the court? *Goddard v. Foster*, 17 Wall. 142; 2 Pars. Cont. p. 610. Do they propound the law of the case correctly? Taking them as a whole, the court says to the jury, in substance, as follows: This is a restrictive assignment; one without recourse; an agreement in writing; and therefore the terms thereof can not be changed by parol evidence. *Martin v. Cole* (1881) 104 U. S. 30, 39. It exempts the assignor from all liability by reason of the insolvency of the maker; and if the bond is genuine, and the amount of money it calls for was owing and unpaid at the time of the assignment, then the assignee is not entitled to recourse the bond by reason of any failure or inability on his part to make the money; that is, the assignee thereby took upon himself all risk of collecting the money, provided it was in fact what it seemed to be—a genuine, valid, subsisting debt. These instructions state the law correctly as applicable to the facts which the evidence tended to prove.

The plaintiff complains in his argument that the effect

of the instructions given, with the refusal to give those asked for by him, was to lead the jury away from the only question in the case. It may have had in some degree that effect; but if so, it could only be by regarding it as a special *assumpsit* on the representation treated as a warranty; and it was not the fault of the defendant or of the court. If it was the fault of any one, it was that of the plaintiff, who insisted on having the court give to the jury as the law of the case, in his view, what he was not entitled to have given in any view, because the facts assumed in his instructions did not make voidable the contract of assignment, and give him the right to rescind and recover back the money paid. He did not ask the court to amend his instructions, or to instruct generally on the subject, but elected to stand or fall by his legal propositions as he had framed them. Is this, the defendant's second verdict, to be set aside for no fault of his or fault of the court?

Inasmuch as the plaintiff failed to show by a suit that there was any legal set-off or counter-claim against the note, failed to show that fact in any way, and the burden of proving that fact being upon him, I do not see how the Circuit Court could have avoided giving judgment against him had the defendant demurred to the evidence.

Finally, I see no plain case of miscarriage of justice on any ground. For the reasons given, the judgment must be affirmed.

CHARLESTON.

PERDUE v. CASWELL CREEK COAL & COKE COMPANY.

Submitted January 19, 1895.—Decided April 3, 1895.

1. PLEADING—SPECIAL PLEA—UNCERTAINTY.

In an action of trespass on the case brought for the recovery of damages for mining and removing coal, the defendants tendered a special plea, which averred "that more than three years before the commencement of the suit, they entered into and were in

peaceable possession of the close and land in the plaintiff's declaration and amended declaration, and each count thereof, mentioned and described, claiming title under a lease of the same for the purpose of digging and operating for coal and oil and other minerals, and that they continuously remained in such possession for the space of more than three years next before the commencement of this action, and have dug and bored, and in good faith expended money in such digging, boring, and operating, and this they are ready to verify." On objection, this plea is bad for want of certainty, and for this reason that it does not state under whom the lease mentioned is claimed.

2. EVIDENCE—TRIAL—REVERSAL.

Whether plaintiff shall be allowed to give further evidence after defendant's evidence is closed is within the discretion of the trial court; and its exercise will rarely, if ever, be the ground of reversal by an appellate court. Clearly, he is entitled to give evidence to rebut that of the defendant.

3. INSTRUCTIONS—DEED—EVIDENCE.

It is error for a court to instruct a jury as to the effect of a deed which is not in evidence before them.

OKEY JOHNSON and A. C. DAVIDSON for plaintiff in error, cited Code, p. 1045; 3 W. Va. 335; 33 W. Va. 447; 36 W. Va. 454; 1 Greenl. Ev. (14th Ed.) § 513; 7 Am. & Eng. Ency. Law 77; 21 W. Va. 16; 14 Pet. 19; 6 Pet. 498; 21 W. Va. 741; 11 W. Va. 75; 1 Wash. 88; 11 Gratt. 405; 11 W. Va. 704; 101 U. S. 797; 1 Black. (U. S.) 204; 60 Am. Dec. 219; 50 Am. Dec. 545; 69 Am. Dec. 408; 70 Am. Dec. 57; 85 Am. Dec. 78; 12 Am. Dec. 656; 36 Am. Dec. 448; 37 Am. Dec. 384; 81 Tex. 258; 22 How. 18; 61 Vt. 298; 4 L. R. A. 425; 88 Mo. 418; 49 N. J. L. 289; 12 Vt. 150; 58 Vt. 642; 48 Vt. 211; 124 Mass. 270; 73 N. Y. 205; 7 S. E. Rep. 473; 154 U. S. 163; 85 Me. 210; 16 W. Va. 282; 24 W. Va. 606; 1 Bart. Law Pr. 182; 3 W. Va. 195.

J. S. CLARK and A. W. REYNOLDS for defendants in error, cited 1 Wait Act. & Def. 114, 715, 131; 23 Vt. 231; 12 Peck. 572; 48 N. Y. 636; 6 Pa. St. 41; 10 Ala. 548; 38 N. Y. 71; 36 How. 306; 26 W. Va. 469; 19 W. Va. 483; 20 W. Va. 480; 3 Call 289; 25 Atl. Rep. 648; 17 Atl. Rep. 84; 6 Cranch 237; 8 Am. Reports 104; 24 Atl. Rep. 18; 33 W. Va. 449; 36 W. Va. 454; 8 W. Va. 135, 156; 1 Dev. & Batt. 40; 16 W. Va. 282; 24 W. Va. 606; 53 Pa. 284; 6 Wait Act. & Def. 64, 65; 3 Black.

Com. 210; 3 W. Va. 195; 25 W. Va. 205; 22 Pa. 378; 66 Pa. 210.

ENGLISH, JUDGE:

This was an action of trespass on the case brought by George W. Perdue against John Freeman and Jenkin Jones, late partners under the firm name and style of the Caswell Creek Coal & Coke Company, in the Circuit Court of Mercer county, to recover damages for coal mined and removed by said defendants from a certain tract of land containing nineteen and thirty nine one-hundredths acres situated in said county.

The defendants demurred to the declaration and each count, which demurrer was overruled as to the first and second counts, and sustained as to the third count, and the case was remanded to rules to file an amended declaration; but as the action of the court on the demurrer is not relied on as error either in the assignment of errors or in the argument, and we see no objection to the declaration, it is presumed to have been waived.

On the 18th day of March, 1891, the defendants tendered a special plea in writing, No. 2 (a plea of license) to the filing of which the plaintiff, by his attorney, objected, but the court overruled said objection, and allowed said plea to be filed, to which plea the plaintiff replied generally. Defendants also tendered a special plea, No. 3, denying the title of the plaintiff to the land in the declaration mentioned, which plea was objected to, and the objection was sustained, and the defendants excepted. The defendants then tendered another special plea, No. 6, denying that the plaintiff was seised and possessed of the close in the declaration mentioned at the time of the commission of the alleged trespass, to which plea the plaintiff also objected. The objection was sustained and the defendants excepted. The defendants then tendered a special plea, No. 4, which was a plea of *liberum tenementum*, which was filed, and issue was joined thereon; another special plea, No. 5, which was a general plea of *liberum tenementum*, alleging title in the "Bluestone Coal Company," in the close mentioned in the declaration and

each count thereof, and that the defendants are the lessees thereof, which was also objected to, the objection overruled and the same permitted to be filed, the plaintiff replied generally and issue was joined thereon. The defendants then tendered another plea in writing, marked No. 6, setting up three years as a bar under the statute to the plaintiff's right of action, which plea was objected to. The objection was overruled and issue was joined thereon. The defendants then offered another special plea, No. 7, which is a plea of the statute of limitations of three years, to which plea the plaintiff objected. The courts sustained said objection, and the defendants excepted, and the plaintiff replied specially to the plea of *liberum tenementum*.

On the 6th day of January, 1892, an order of survey was directed. On the 22d day of December, 1892, the death of John Freeman was suggested, and the case was directed to proceed against Jenkin Jones, surviving partner of John Freeman and Jenkin Jones, partners, trading as the Caswell Creek Coal & Coke Company, and the case was submitted to a jury, which after several adjournments, found a verdict for the defendants, and thereupon the plaintiff moved to set aside the verdict, and grant him a new trial, because said verdict was contrary to the law and the evidence, which motion was overruled, and the plaintiff excepted. Said plaintiff also moved in arrest of judgment, which motion was overruled, and the plaintiff excepted, and judgment was rendered for the defendants, and the plaintiff obtained this writ of error.

The first error assigned and relied on by the plaintiff in error, is as to the action of the court in allowing, against the objection of the plaintiff, pleas Nos. 2, 4, 5 and 6, to be filed. In argument, however, counsel for the plaintiff in error do not insist on their objection to the action of the court in overruling their objection to any of the pleas tendered by the defendants, with the exception of plea No. 6, which plea is in these words: "And the defendants, for further plea in this behalf, say that the plaintiff's action against them ought not to have and maintain, because they say that more than three years before the commencement of this suit they

entered and were in peaceable possession of the close and land in the plaintiff's declaration and amended declaration, and each count thereof, mentioned and described, claiming title under a lease of the same for the purpose of digging and operating for coal and oil and other minerals, and that they have continuously remained in such possession for the space of more than three years next before the commencement of this action, and have dug and bored for and in good faith expended money in such digging, boring and operating and this they are ready to verify."

Now, while it is true that this plea is substantially in the language of the statute under which the defendants are seeking to shield themselves, the question is whether it is sufficient to give the plaintiff notice of the true character of their defense. To merely say that the defendants are in possession under a lease gives the plaintiff no information as to the party under whom they claim as landlord, so that, if the plaintiff should wish to reply specially to said plea, he is precluded from so doing by reason of the fact that the lease is not sufficiently described in the plea to enable him to determine whether it constitutes a valid defense or not, or whether it should be met by a general or special replication. And Steph. Pl. p. 355, § 183, under the heading "The Pleadings Must Show Authority," states the rule thus: "In general, when a party has occasion to justify under a writ, warrant, precept, or any other authority whatever, he must set it forth particularly in his pleading." Co. Litt. 283, says: "Regularly, whensoever a man doth anything by force of a warrant or authority, he must plead it." And on page 342 the same author says: "When in pleading, any right or authority is set up in respect of property, personal or real, some title to that property must, of course, be alleged in the party or in some other person from whom he derives his authority." And the same author, on page 347, § 176, says: "With respect to particular estates, the general rule is that the commencement of particular estates must be shown. If, therefore, a party sets up in his own favor an estate tail an estate for life, a term of years, or a tenancy at will, he must show the derivation of that title from its commencement—

that is, from the last seisin in fee simple; and, if derived by alienation or conveyance, the substance and effect of such conveyance should be precisely set forth." Again, we find the law stated in 6 Rob. Prac. p. 669. In speaking of a case in 2 Salk. 642, the author says: "The case, however, in Salkeld, settled that it was sufficient for a man to justify upon his possession against a wrongdoer; but it does not go to the length of showing that such a justification is good as against a person who has the title to the land, and who makes an entry in pursuance of that title. When the justification is under the right of another person, there should be an allegation of authority from the principal under whose right the act complained of was committed. Thus, if the defendant justifies breaking a close, on the ground that it is the freehold of another, he is bound to state that he did so enter by the command and as the servant of the owner of the close, and so it is in similar cases, for *non constat* that the party entitled would have ever insisted on his right, and there can be no reason, if he thinks proper to waive it, why a stranger should justify himself in standing in his place."

That this plea is defective for lack of certainty is manifest for the following reason: Suppose the plaintiff desired to reply specially thereto, the plea in its present form does not afford him an opportunity of thereby controverting the validity of the title of defendants' lessor, for the reason that it is not named. The plea merely says that they were in possession, claiming title under a lease of the same for the purpose of digging and operating for coal and oil and other minerals. The lease mentioned may have been valid and formal in every respect, and may have been executed by one having an unimpeachable title to the land, and may have conferred ample authority upon the defendants to enter upon the land, and mine and remove the coal, or it may have emanated from a stranger, and not been worth the paper upon which it was written; but this plea affords the plaintiff no light or information as to its character in that regard, and it can not be presumed that the legislature ever intended that a man with a lease in his pocket from some stranger should open a seam of coal on the mountain side, and, after

three years' possession, be allowed to plead the facts in bar of a recovery for such trespass. Such a construction would be dangerous, indeed, to property owners in this state, who are absent from the state, or for any cause fail to keep an eye upon their coal lands; and for these reasons we think the court erred in overruling the objection to said plea, and permitting the same to be filed.

The third and fourth assignments of error relied upon by the plaintiff in error are as follows: "*Third*, The court erred in excluding from the jury the record in the case of *Straley & Johnston v. Perdue*, because the parties were in privity, and Straley & Johnston had conveyed by deed of general warranty the Perdue tract to Bartholomew, trustee, only a few days before they accepted the deed from Perdue, and filed the bill to perfect the title in their vendee. *Fourth*, The court erred in refusing to permit A. C. Davidson, a witness introduced for plaintiff, to prove that the suit of Straley & Johnston was prosecuted for the benefit and at the instance of their vendees. This evidence was clearly proper, and could better be introduced in rebuttal than in chief, because the defense claimed that the land was included in the Bell deed, which was derived by plaintiff; and the record was relied on to rebut that claim." These assignments of error may be considered together, and, in order that the question presented by these two assignments may be better understood, it is necessary to state briefly the circumstances connected with this case, which gave rise to the effort on the part of the plaintiff in error to introduce the record in the case of *Straley & Johnston v. Perdue* as evidence therein, and to show by the witness A. C. Davidson that said suit of *Straley & Johnston v. Perdue* was prosecuted at the instance and for the benefit of their vendees.

In the month of November, 1885, said Straley & Johnston brought suit in equity in the Circuit Court of Mercer county against said George W. Perdue, in which they claimed to have purchased from said Perdue all of the coal underlying his home tract of land which had been conveyed to him by one Henry Bell, with the exception of the coal underlying twenty five acres thereof, which was to be laid off so as to

include his house and buildings and two springs, which tract they alleged was afterwards surveyed for the purposes of making conveyances, and by mistake the nineteen acres in controversy was omitted from the description furnished by the surveyor. It was claimed that the title bond called for all of the coal under the land conveyed to said Perdue except said twenty five acres. The facts alleged in the bill were put in issue by answer and proofs taken, and the Circuit Court proceeded to specifically enforce said contract, and directed that said strip of coal land of nineteen and thirty nine one hundredths acres be paid for at the contract price, and that said G. W. Perdue should execute and file among the papers a deed, in which his wife should unite conveying said nineteen and thirty nine one-hundredths acres of land to said Straley & Johnston. From this decree an appeal was taken to this Court, and the same was reversed and the plaintiff's bill was dismissed. See 33 W. Va. 375 (10 S. E. Rep. 780).

The plaintiff in this action was seeking to introduce as evidence the record of the chancery suit in the case of *Straley & Johnston v. Perdue* and the mandate of this Court, with a view of showing that the question as to the ownership of said nineteen and thirty nine one-hundredths acres was *res adjudicata*, by the ruling of this Court in said chancery suit. The record in the case of *Straley & Johnston v. Perdue*, was excluded from the jury by the court, on the ground that the defendants in this case were not parties thereto. The plaintiff then sought to prove by a witness, A. C. Davidson that the said suit of *Straley & Johnston v. Perdue* was prosecuted at the instance and for the benefit of their vendees. This witness was offered after the defendants had rested their case, and it appears that the plaintiff re-offered as evidence the record in the case of *Straley & Johnston v. Perdue*, together with the mandate of this Court in said cause, and, in connection therewith offered to prove by said witness A. C. Davidson, that said suit of *Straley & Johnston v. Perdue* was instituted and prosecuted at the instance

and with the approval of the Bluestone Coal Company, and for its benefit; and the Court, on its own motion, declared that it was not its purpose to open this case after the long time engaged in it for the admission of evidence in chief, the plaintiff having the day before yesterday rested from his case, and declared himself through in chief; and, to the end that the case might be concluded in a reasonable time, the court declined to permit said evidence to be introduced and the plaintiff excepted.

The object of this testimony was to show that said Straley & Johnston were in privity with the defendants, and the first question we shall consider is whether the court acted properly in excluding the testimony of said witness on the ground that it came too late. Upon this question, Thompson on Trials (volume 1, p. 310, § 384) says: "So it is within the discretion of the trial court, both in civil and criminal trials, to re-open the case at the request of a party for the purpose of allowing him to introduce additional evidence. The court may allow a party to introduce further evidence after the testimony has closed on both sides, after a demurrer to the evidence has been made, after the argument has commenced, and even after the argument has closed. The court may allow the prosecution in a criminal trial to re-open its case and introduce further evidence in chief even after the examination of witnesses for the defense has commenced, and after the state has closed, and the defendant has announced that he will introduce no evidence, though it has been elsewhere said that this discretion should be exercised with the utmost caution. This discretion will not be exercised where it would work a fraud on the opposite party, or where the withholding of the evidence was a manifest trick; and, if the introduction of the additional evidence takes the adverse party by surprise, he should be allowed time and opportunity, if desired, to meet it with further evidence on his side. It is scarcely necessary to add that it is not an abuse of discretion for the trial court to refuse to open a case to admit further defenses after the trial where the defendant, knowing of the existence of the defenses, neglected to assert them in his pleading in the first instance,

and gives no satisfactory reason for the neglect. But where the plaintiff has inadvertently omitted to introduce a formal, though necessary document, until after the close of his evidence, it will be an abuse of discretion, for which the judgment will be reversed, to refuse his application to be allowed to introduce it then." See *Meacham v. Moore*, 59 Miss. 561. Now, if the testimony of A. C. Davidson was a matter for rebuttal, it should have been allowed to go to the jury. By reference to the record (page 98) it will be seen that the record of this chancery suit of *Straley & Johnston v. Perdue* and the mandate of this Court were offered in evidence; and on page 134 of the record the court said, "It may go in." On page 135 the whole record in the case of *Straley & Johnston v. Perdue* was offered in evidence, and was objected to, and the court's opinion was reserved; and on page 186 of the record, at the close of the plaintiff's testimony in chief, the plaintiff offered separately and collectively so much of the printed record as had theretofore been offered in manuscript, in so far as it was contained in the printed record. It was objected to by the defendants, and the objection sustained. The defendants then introduced their testimony, during the introduction of which they offered in evidence documents and testimony tending to show that Straley & Johnston had conveyed the coal underlying the land in controversy to Bartholomew, trustee, before the suit of Straley & Johnston was brought against said Perdue; and, at the close of the testimony, the defendants, by their counsel, renewed their motion to strike out the record of the chancery suit of *Straley & Johnston v. Perdue*; but, before the court passed upon the motion, plaintiff, by counsel, gave notice that he desired to introduce further evidence to show the privity of the Bluestone Coal Company and the defendant Jones, surviving partner, etc., with the plaintiffs in said chancery suit of *Straley & Johnston v. Perdue*, and to show that said chancery suit was prosecuted at the instance and with the approval and for the benefit of the Bluestone Coal Company and its lessees, Freeman and Jones, partners, under the name of the Caswell Creek Coal & Coke Company. Thereupon the court declared that it had given plaintiff

five days in which to make out his case, and it was not the purpose of the court to open the case for further evidence in chief, and sustained said motion, and excluded said record of said chancery suit, and every part thereof, for the reason that the proceedings in said suit were *res inter alios acta* and that the defendants in this suit could not be prejudiced thereby. The defendants then rested their case and the plaintiff, by his counsel, at once re-offered the record in the case of *Straley & Johnston v. Perdue*, together with the mandate of this Court, and, in connection therewith, offered to prove by the witness A. C. Davidson that the said suit of *Straley & Johnston v. Perdue* was instituted and prosecuted at the instance and with the approval of the Bluestone Coal Company, and for its benefit; and the court refused to allow said testimony to be given to the jury, and the plaintiff by counsel excepted.

Now, while it is true that in the trial of a case at law much is left to the discretion of the trial judge as to the order and time that testimony is to be adduced, yet, in exercising this discretion, it must be a sound legal discretion, and must be so exercised, if possible, as not to do injustice to either party. When we consider that the record discloses the fact that this chancery record was at first allowed to go in, and then the printed record was offered, and was excluded, just as the plaintiff was resting his case, and, when the defendants rested their case, they moved the court to strike out the record of the chancery suit, for the reasons above stated, a question of surprise to the plaintiff is suggested. Now, while I can not regard the testimony which the plaintiff then offered to introduce by the witness A. C. Davidson as strictly in rebuttal, or that said testimony would have been unnecessary to establish the plaintiff's case but for the documents and testimony introduced by the defendants, and by the exclusion of said chancery record at the first moment, upon the grounds stated by the court, yet the object of the plaintiff in introducing the witness A. C. Davidson, as was stated at the time, was to prove that the said chancery suit of *Straley & Johnston v. Perdue* was instituted at the instance and for the benefit

of the Bluestone Coal Company, the lessors of the Caswell Creek Coal Company. Now, the record shows that, after the plaintiff had rested, the defendant proceeded to offer testimony tending to show that Straley & Johnston had conveyed the land in controversy to Bartholomew, trustee, before said chancery suit of *Straley & Johnston v. Perdue* was instituted, and that, therefore, the defendants had no interest in said chancery suit, and were not bound by its decree. The decree of this Court, however, held that the deed from Perdue to Straley & Johnston did not include said nineteen and thirty nine one-hundredths acres, and, as a consequence, the deeds to Straley & Johnston to Bartholomew, trustee, *etc.*, to the Bluestone Coal Company, did not convey to them said nineteen and thirty nine one-hundredths acres. This ruling, however, would not be binding upon the defendants unless they or their lessors were privies to the suit; and while the evidence of the witness A. C. Davidson might be regarded as in rebuttal to the testimony of the defendants, which tended to show that the defendants had no interest in said chancery suit, and were not bound by the determination thereof, yet it is evidence that might have and perhaps ought to have been offered in chief by the plaintiff at the time said chancery record and mandate were offered. Upon this question of discretion by the court in controlling the order in which evidence shall be admitted, this Court has held that "whether a party shall introduce further evidence after that of the adverse party has been heard is a matter within the discretion of the court, and its exercise will rarely, if ever, be the cause of reversal in appellate court. Clearly, he is entitled to introduce evidence to rebut that of the other party." See *Johnson v. Burns*, 39 W. Va. 659 (20 S. E. Rep. 686); *Clarke v. Railroad Co.*, 39 W. Va. 734 (20 S. E. Rep. 696); *Bowyer v. Knapp*, 15 W. Va. 278; *Brooks v. Wilcox*, 11 Gratt. 411. I am inclined to think that under the circumstances, the exercise of a sound discretion would have allowed the testimony of Davidson to have gone to the jury, even though it should have been given in chief; but as the case is to be remanded on

other grounds, and upon a new trial a different course may be adopted, it is unnecessary to now determine the question.

As to the question raised by the fifth assignment of error as to the propriety of instruction No. 2 given at the instance of defendant, in which the court instructed the jury that "the deed from George W. Perdue to H. W. Straley and David E. Johnston, dated the 5th day of February, 1884, and which is in evidence in this case, conveyed to said Straley & Johnston all the coal and minerals in and under the whole of the tract of land which was conveyed to said George W. Perdue by Henry Bell by deed, which is in evidence in this case, except the twenty five acres reservation contained in the title bond of the said Perdue to said Straley & Johnston, which is in evidence in this case, and in the deed dated the 5th day of February, 1884, from said Perdue to said Straley & Johnston; and the jury can not find for the plaintiff any damages on account of the entering, mining and carrying away the coal, or any part thereof, from said nineteen and thirty nine one-hundredths acres of land in controversy in this case"—which instruction appears to have been given after all the evidence was before the jury, and directs the jury to pass on the effect of the deed, claiming that the same was in evidence before the jury when in fact it was not ; the only place in which a certified copy of said deed is found being in said chancery record, which was excluded from the jury. This instruction we regard as erroneous, and it had a direct tendency to prejudice the plaintiff.

For these reasons, the judgment must be reversed, and the cause remanded, with costs to the plaintiff in error.

CHARLESTON.

ROBINSON v. WELTY.

Submitted June 7, 1894—Decided April 3, 1895.

40	385
40	389
40	385
43	60
43	370
40	385
163	508

1. ASSUMPSIT—SPECIAL COUNT—ASSIGNEE OF FRAUDULENT MORTGAGE.

A party buys and takes a conveyance of certain real estate from a second party, who is insolvent. The real estate is subject to three mortgages and a judgment lien. The first party, for the purpose of making a proper application of the purchase money and in order to control and thereby clear off the charges and liens, having made known to a third party, one of the mortgagees, his object, takes from him a separate written assignment of one of the mortgages and the negotiable note payable to his order, not yet due, thereby secured, which was not endorsed; and the first party was ignorant of the facts, but was induced by the false and fraudulent representations of the third party, the mortgagee, who knew that the mortgage was fraudulent and voidable, to believe, and did believe, that the mortgage of two thousand dollars was a valid and subsisting charge to the extent of one thousand, two hundred and three dollars and eighty two cents, which sum he paid the mortgagee for the assignment, when in fact, and to the knowledge of the third party, the mortgage was wholly without consideration, and had been given and taken with the intent to hinder, delay and defraud the creditors of the mortgagor, and was so held in a suit to foreclose, of which the assignor had notice, and was therefore wholly worthless to the assignee. *Held*, such assignee is entitled to recover back the sum with its interest, paid for the assignment. Such recovery may be had on a special count in general *indebitatus assumpsit*, setting forth specially the facts creating the liability, and averred as the consideration of the promise.

2. ASSUMPSIT—MONEY HAD AND RECEIVED.

It may also be recovered back on the common count in general *indebitatus assumpsit* for money had and received, accompanied with a sufficient bill of particulars.

3. ASSUMPSIT—*Bona Fide* ASSIGNEE—FRAUDULENT MORTGAGE.

In such case it is not a good defense for the assignor to aver and prove that if the assignee, the plaintiff in the suit to foreclose, had set up, by way of confession and avoidance, the fact that he was a *bona fide* assignee for value, without notice of the fraud rendering void the mortgage as against the creditors

of the mortgagor, it would have been held good in his hands and allowed. See *Holmes v. Gardner* 33 N. E. Rep. 644 (50 Ohio St. 167).

4. ASSUMPSIT—EXPRESS WARRANTY.

General *indebitatus assumpsit* does not lie for the breach of an express contract of warranty.

HENRY M. RUSSELL for plaintiff in error, cited 1 Chitt. Pl. 107; Cooley on Torts, 91 to 95, 497 to 501; 15 Gratt. 572; 1 Benj. Sales, § 694; 33 N. E. Rep. 644; 14 O. St. 406; 35 W. Va. 155; 35 W. Va. 15; 33 W. Va. 553; 2 Black Judg. §§ 600, 569, 572, 573 and 574, 570; 18 S. E. Rep. 569; 16 W. Va. 245; 5 Am. & Eng. Encl. Law 344; 34 N. Y. 275, 279.

J. D. ELSON and GEO. E. BOYD for defendant in error, cited 21 W. Va. 709; 38 W. Va. 645; Code, c. 34, s. 5; 34 W. Va. 279; 4 Hill 119; 1 Sandf. 78; 1 Greenl. §§ 523-538; 2 Leigh. 293; Gilm. 235; 2 Rand. 313; 13 Ohio St. 136; 9 Gratt. 323; 32 W. Va. 21; 43 Vt. 98; 42 Iowa 18; 15 W. Va. 702; Kerr on Fraud (Bump's Ed.) p. 104; 9 S. E. Rep. 930; Kerr 384; 7 W. Va. 390; 17 W. Va. 717; Story Eq. § 191; 17 W. Va. 769; Kerr 385; 2 Greenl. Ev. § 120; 1 Chitty Pl. 100-107; 2 Id. 688-9; 4 Mass. 488; 37 W. Va. 797.

HOLT, PRESIDENT:

This is an action of *assumpsit* brought by the assignee of a mortgage, to recover back from the assignor the purchase-money, the mortgage having proved to be invalid. Upon trial in the Circuit Court of Ohio county there was a verdict and judgment for plaintiff, Robinson, the assignee, and this writ of error was granted defendant, Peter Welly.

The grounds of error relied on in this Court are as follows: "*First*. Because the court below overruled the demurrer to the special count in the declaration. *Fifth*. Because the court erred in permitting the record mentioned in the special count to go in evidence. *Sixth*. Because the court refused to sustain defendant's motion to exclude plaintiff's evidence after he had rested his case. *Seventh*. It was error for the court to give the five instructions given for plaintiff. *Eighth*. The court should have granted plaintiff's motion to set aside the verdict and grant a new trial."

I here give in full the special count and instructions given. The demurrer, which involves the merits, can not be fairly considered without setting out the count in full; and besides, leaving out all the charges of fraud and falsehood it gives a fairly good, connected statement of the facts which the evidence proves, and tends to prove, as it is viewed on motion to set aside the verdict.

Declaration: "In the Circuit Court of Ohio county. *William H. Robinson vs. Peter Welty. In assumpsit.* July Rules, 1889. William H. Robinson complains of Peter Welty, who has been summoned of a plea of trespass in the case upon promises, for this. That heretofore, to wit, on the 27th day of October, 1885, he (the said plaintiff) purchased of one John J. McDermott certain real estate situated in Bellaire, Belmont county, in the state of Ohio, for which he agreed to pay the sum of two thousand seven hundred dollars. At the time of the said purchase, the said defendant held and owned two mortgages on said real estate, duly recorded in the office of the recorder of the said county of Belmont—one dated on the 28th day of January, 1879, and given to secure to Peter Welty, the said defendant, the payment of a promissory note, dated January 25, 1879, by which the said McDermott promised to pay to the defendant, two years after the date thereof, six hundred and seventy seven and thirty five hundredths dollars, with interest from the date thereof, at the rate of eight *per cent. per annum*; and the other of said mortgages was dated on the thirty first day of January, 1885, and purported to be given to secure to the said defendant the payment of a negotiable, promissory note, dated January 31, 1885, by which the said McDermott promised to pay to the order of the said defendant, twelve months after the date thereof, at the German Bank of Wheeling, two thousand dollars, for value received, with interest at the rate of six *per cent. per annum* from date. And the plaintiff avers that, while he was in treaty with the said McDermott for the purchase of the said real estate, the said defendant represented that there was then, to wit, on the 26th day of October, 1885, due and owing on the note first above mentioned the sum of seven hundred and fifteen dollars and eighteen cents, and

also falsely and fraudulently represented to the said plaintiff that there was then, to wit, October 26, 1885, due and owing to him, the said defendant, by the said McDermott, on the negotiable note dated January 31, 1885, the sum of one thousand two hundred and three dollars and eighty two cents. And the plaintiff further avers that afterwards, to wit, on the 29th day of October, 1885, at the county of Ohio, and after the purchase and conveyance of said real estate as aforesaid, the said defendant assigned and transferred to him, the said plaintiff, the said two notes. The plaintiff, relying on the said representations of the said defendant as to the amount due and owing to him on said two notes, and without notice that such amounts were in fact not due, then and there in consideration of such assignments and transfer, paid to the said defendant the sum of one thousand nine hundred and nineteen dollars, being the aggregate of the amounts which the said defendant falsely and fraudulently represented to the said plaintiff were due and owing to him on the said two notes secured by mortgages as aforesaid; but he avers the fact to be that there was not due and owing to the said defendant from the said McDermott the sum of one thousand two hundred and three dollars and eighty two cents, or any part thereof, on the note for two thousand dollars, dated January 31, 1885, and that such note and the mortgage given to secure the same were fraudulent and void and without consideration. At the time of the purchase of the said real estate from the said McDermott by the said plaintiff, there was another lien on the same, created by the said McDermott by a mortgage dated October 25, 1878, given to secure Sullivan, Barnard and Cowen the payment of certain notes therein mentioned. These notes were also assigned and transferred to the said plaintiff, he paying the holders and owners thereof the balance due thereon. Subsequent to the purchase of the said real estate by the said plaintiff as aforesaid, the same was sold to satisfy a judgment lien of ——— Dubois and ——— McCoy, partners, doing business under the firm name of Dubois & McCoy, which judgment was against the said McDermott, and was a lien on the said real estate at the time of the said purchase by

the plaintiff, but was of a later date than the three mortgages aforesaid, and of inferior dignity to them; and the said Dubois & McCoy became the purchasers of the said real estate at the last named sale, subject, however, to the lien of the said three mortgages, which had been assigned to and were still held by the said plaintiff. Under proceedings subsequently had in the court of common pleas of Belmont county in the state of Ohio by the said Dubois & McCoy to recover possession of said real estate, he, the said plaintiff, set up and relied on the three mortgages aforesaid; and while, in said proceedings, the said mortgage to Sullivan, Barnard and Cowen, dated October 25, 1878, and to the said defendant, dated January 28, 1879, were held valid liens, and the said plaintiff was permitted to recover, and by the judgment of said court did recover, the amounts found due on the notes secured by the said last named two mortgages, yet the mortgage to the said defendant, dated January 31, 1885, was declared to be fraudulent, and by the judgment of said court in said proceedings held and adjudged to be null and void, and the plaintiff was not permitted to recover the same, or any part thereof, of all of which the said defendant then and there had notice, by reason whereof, and by means of the premises, the said sum of one thousand two hundred and three dollars and eighty two cents, which the said defendant falsely and fraudulently represented was due and owing to him as aforesaid, was wholly lost to the said plaintiff, whereby, and by reason of the premises, the said defendant became liable to pay him the said sum, of one thousand two hundred and three dollars and eighty two cents, with interest thereon from the 29th day of October, 1885. And being so liable, the said defendant, afterwards, to wit, on the 1st day of November, 1885, at the county of Ohio, undertook and faithfully promised to pay him, the said plaintiff, the said sum of one thousand two hundred and three dollars and eighty two cents, with interest thereon from October 29, 1885, when he should be thereunto afterwards requested. Nevertheless, the said defendant, not regarding his promise and undertaking, and contriving and intending to deceive and defraud the said plaintiff in this behalf, hath not as yet

paid to the said plaintiff the said sum of one thousand two hundred and three dollars and eighty two cents with the interest thereon as aforesaid, or any part thereof, but to pay the same hath hitherto wholly neglected and refused, and still doth neglect and refuse, to the damage of the said plaintiff in the sum of one thousand five hundred dollars."

Plaintiff's instructions: "No. 1. The court instructs the jury that if they believe from the evidence that Robinson paid to Welty a sum of money in consideration of the assignment of two notes of McDermott's and of the mortgages made to secure these, and that Welty falsely and fraudulently represented or induced Robinson to believe, and that he did believe, that there was owing to him one thousand nine hundred and nineteen dollars thereon, and that Robinson relying on such representation paid him that amount of money, if in fact nothing was due on one of such notes, then Robinson is entitled to recover in this action so much of the sum of one thousand nine hundred and nineteen dollars as was paid to Welty for the assignment of the note on which nothing was due and owing, unless they further believe from the evidence that Robinson knew and understood at the time he so paid the money that Welty was to pay such money to Mrs. McDermott, and paid such money with that understanding. No. 2. The court instructs the jury that if they believe from the evidence that Welty falsely and fraudulently represented to Robinson that there was due on the note of McDermott one thousand two hundred and three dollars and eighty two cents and that Robinson, relying on such representation, paid him one thousand two hundred and three dollars and eighty two cents, and if they further believe in fact there was nothing due to Welty on said note, and that Robinson has lost the amount so paid, then he is entitled to recover in this action the amount so paid, with interest thereon from the time of payment, unless they further believe that Robinson knew at the time he paid the money that there was nothing due on such note, and that one thousand dollars of the money so paid was to be turned over to McDermott. No. 3. The court instructs the jury that if they believe from the evi-

dence that the defendant, Welty, paid over to Mrs. McDermott a part of the money received by him from the plaintiff, Robinson, for the assignment of the two notes and mortgages held by Welty, this is no defense to Robinson's claim in this action, unless they further believe from the evidence that at the time he paid the money to Welty, he knew and understood that Welty was to pay a part of the money over to Mrs. McDermott, and that he paid Welty with such an understanding. No. 4. The court instructs the jury that if they believe from the evidence that the note for two thousand dollars and the mortgage made to secure it were without any consideration, fraudulent and void, and that they were assigned by the defendant to the plaintiff for value, then the burden of proof rests on the defendant to show that the plaintiff knew that they were without consideration, fraudulent and void when they were assigned to him, and also that the plaintiff knew and understood at the time of such assignment that one thousand dollars of the money paid by the plaintiff was to be paid over by the defendant to Mrs. McDermott. No. 5. The jury are instructed that it was not necessary on the part of the plaintiff to prove the false representations alleged in the declaration by express and positive statements of the defendant, but it was sufficient to prove them by his acts and conduct; and if the jury believe from the evidence that the defendant, by his acts and conduct, induced the plaintiff to believe that the mortgage for two thousand dollars was a valid mortgage, and that there was money due and owing to him on account of the said mortgage, and the plaintiff was thereby induced to pay him the amount so claimed to be due, then the plaintiff is entitled to recover the amount so paid, unless they further believe that the plaintiff knew it was to be paid to McDermott or his wife."

It is contended that the demurrer to the declaration should have been sustained. *First*, because the form of the action has been misconceived; that the injury complained of, if any, is a tort for which the proper remedy is case, and it is not a case in which an action *ex contractu assumpsit* can be brought; *second*, the special count of the declaration alleges

that representations were made, and that they were false, but wholly omits to allege that they were knowingly false and made with intent to deceive.

Here the tort is averred in detail, as showing the liability, and the liability as the executed consideration of the promise, and the promise is set forth as an express one. The promise must be so averred, though the duty or obligation arises *dehors* all contracts expressed or implied, in fact, and as solely created by the law; for in all cases the declaration in *assumpsit* must show that a promise has been made by expressly averring that the defendant undertook or promised, or by other equivalent words (see 1 Chit. Pl. 392); and no distinction in this respect exists in common-law pleading between an implied promise and an express one (*Id.* 394; Bish. Cont. § 190; *Avery v. Tyringham*, 3 Mass. 160; *McGinity v. Laquerenne*, 10 Ill. 101; *Wingo v. Brown*, 12 Rich. Law 279; *Muldrow v. Tappan*, 6 Mo. 276; *McNulty v. Collins*, 7 Mo. 69); "and the presence or absence of these words is a test of distinction in declaring between *assumpsit* and case." *Trespass on the case* is generally used as the generic term, comprehending the three classes—*case*, *trover* and *conversion*, and *assumpsit*. See Hare, Cont. 132; Andrews' Steph. Pl. § 52; 26 Am. & Eng. Enc. Law 694. And, although *assumpsit* long ago became an action strictly *ex contractu*, it was in its origin an action *ex delicto*, and the express undertaking averred was the inducement, and the gist of the action was the disregard or refusal to complete or perform such undertaking by continuing and intending to deceive the plaintiff in that behalf. See Holmes Com. Law 183; Bigelow Lead Cas. "Torts," p. 20; *Chandelor v. Lopus*, 1 Smith Lead Cas. (9th Am. Ed.) 319, 330. The transition from an express undertaking to one to be implied as a fact from conduct would be easy, especially where helped out by the requirement of it by equity and good conscience; and, for the sake of the remedy, it would be easy to pass to the case where the obligation or duty violated had no foundation but a consideration which had moved from the plaintiff, and the requirement of the discharge of such obligation in equity and good conscience. For an interesting dis-

cussion of the general subject, see Keener Quasi Cont., c. 1, *et seq.*

In the special count, the plaintiff avers: That on the 27th day of October, 1885, he bought of one John J. McDermott certain real estate in Bellaire, in the state of Ohio, for the sum of two thousand seven hundred dollars. At the time of the purchase, defendant, Peter Welty, held two mortgages on the real estate—one dated January 28, 1879, to secure a note made by McDermott to Welty for six hundred and twenty seven dollars and thirty five cents; the other (the only one here involved) dated January 31, 1885, given to secure a negotiable note made by McDermott, payable to the order of Welty, for the sum of two thousand dollars and interest, twelve months after date, at the German Bank of Wheeling. That, while plaintiff was in treaty with McDermott for the purchase of the real estate, defendant falsely and fraudulently represented to plaintiff that there was then, to wit, on the 26th day of October, 1885, due and owing him (defendant) from McDermott on the note and mortgage of two thousand dollars, the sum of one thousand two hundred and three dollars and eighty two cents. That, after his purchase from McDermott, the plaintiff, relying on the representation of defendant of the amount due and owing on the note and mortgage, and without knowledge that such sum was not in fact due, then and there took a transfer of said note and assignment of said mortgage, and in consideration thereof paid to defendant said sum of one thousand two hundred and three dollars and eighty two cents, but in fact said sum was not due and owing, but said deed of trust was wholly without consideration, fraudulent as against creditors of McDermott, and void, and was so adjudged; of all which facts defendant had notice.

It is seen that this is what we may strictly call a special count in general *indebitatus assumpsit*, as distinguished from a count on an express contract or promise, being simply the common count in the action of debt, with a slight change in the conclusion. It rests on a liability created by law as springing out of the facts set forth in the inducement, and the question raised by the demurrer is, does such legal liability

thus arise as a point of law out of the facts alleged as justifies a recovery in general *indebitatus assumpsit*? It would be a misleading misnomer to call this a "special *assumpsit*." That would set forth the representation made by defendant, Welty, as a contract of warranty, as collateral to the contract of assignment, alleging the breach of such express contract and the injury and the damages thereby sustained, and upon such a contract, as a subsisting one, *indebitatus assumpsit* would not lie. See *Cutter v. Powell*, 2 Smith Lead. Cas. (9th Am., from 9th Eng. Ed.) 1226, 2 Smith Lead. Cas. (8th Am. Ed.) pt. 1, p. 48. Therefore, if this count, by reason of its want of an averment of the *scienter*—the guilty knowledge on the part of the assignor—does not allege facts creating a liability for deceit, we can not by leaving it out make a good count on the express contract of warranty where the *scienter* would be wholly immaterial. But I do not think it can be said that it is defective in this regard, for it avers that a false representation was fraudulently made—that is, was deliberately made with intent to deceive; besides, it avers that defendant had notice of all the facts set forth; and the fact of the mortgage being fraudulent and void, without consideration, and made with intent on McDermott's and defendant's part to hinder and delay McDermott's creditors, is so alleged as to make it a matter of special knowledge which it was defendant's duty to know, such positive affirmation of such facts comprehends an averment of the *scienter*. But is the liability alleged a liability which can be enforced in *indebitatus assumpsit*? If defendant obtained the sum of one thousand two hundred and three dollars and eighty two cents from plaintiff by the false and fraudulent representation that the mortgage was a valid and subsisting claim to that extent, then, according to the cases, he is bound to refund it, for the mortgage was voidable, and has been held to be void and worthless; for the only object he had in view in buying it, and the consideration which induced plaintiff to pay the sum of one thousand two hundred and three dollars and eighty two cents has wholly failed. In such a case the law puts the defendant under obligation to refund the money. In equity and good conscience he can not

retain it, and this action as on a *quasi* contract will lie for its recovery. *Moses v. Macferlan*, 2 Burrows 1012. In 1 Chit. Pl. 157, it is said: "Nor is *assumpsit* the proper remedy in the case of a deceitful representation not embodied in or noticed on the face of a written contract between the parties, but the remedy should be *case* for the fraud"—citing *Meyer v. Everth*, 4 Camp 22; *Gardiner v. Gray*, *Id.* 144; *Laing v. Fidgeon*, *Id.* 169; Lord Ellenborough, C. J., in *Powell v. Edmunds*, 12 East. 11. It will be found that these cases turn on a rule of evidence which does not permit a written instrument to be varied or added to by parol, nor do they apply to *indebitatus assumpsit* in such a case as this, where the defendant has by fraud and covin obtained the plaintiff's money. See Cooley Torts 107 *et seq.*

The action for money had and received may generally be maintained where the money of one man has without consideration got into the pocket of another; or, as it is sometimes expressed, a man can not have something for nothing; "a man shall not be allowed to enrich himself unjustly at the expense of another." Keener Quasi Cont. p. 19. Since one has the right to recover the proceeds of property wrongfully converted and sold, it necessarily follows that where the plaintiff's money has been tortiously obtained by the defendant, the tort may be waived, and an action for money had and received be brought. *Id.* p. 180, where this branch of the subject of *quasi* contract is fully discussed, and many of the cases brought together. The law seems to be settled by many cases that where the plaintiff's money has been wrongfully obtained by the defendant by misrepresentation of fact or other false pretense, the tort may be waived and an action for money had and received be brought (*Catts v. Phalen*, 2 How. 376; *Burton v. Driggs*, 20 Wall. 125); for, where the defendant has obtained the plaintiff's money from him by fraud and deceit, the law implies a promise from the wrongdoer to restore it because *ex aequo et bono* the defendant ought to refund the money, and to enforce such obligation the action of *assumpsit* lies. *Garber v. Armentrout*, 32 Gratt. 235, 239. See 2 Rob. New Prac. 454; *Bliss v. Thompson*, 4 Mass. 488; *Lyon v.*

Annale, 4 Conn. 350, 355; 2 Greenl. Ev. (15th Ed.) § 120; Bish. Cont. §§ 225, 226.

It may be stated in this connection that this declaration also contains the common count for money had and received, and with it the plaintiff has filed an account stating distinctly the particulars and nature of his claim. By the authorities cited we have seen that this count may be supported by evidence that the defendant obtained the plaintiff's money by fraud, false color, or pretense. 2 Rob. New Prac. 454. And in *Johnson v. Jennings*, 10 Gratt. 1, it is said that this is the usual and better mode of counting in such cases. And entire damages having been given, and there being one good count, that is sufficient to support the verdict. See Code, c. 131, s. 13. And it would be hard to say what injury the defendant could have sustained by overruling his demurrer to the special count, conceding it to have been deficient as full proof of all the counts.

This special count avers that defendant made to plaintiff the false and fraudulent and material representation that the mortgage given to him by McDermott was a valid and subsisting debt to the extent of one thousand two hundred and three dollars and eighty two cents, whereas, as he knew, it was wholly without consideration, nothing was due, but it was given by McDermott and taken by defendant for the purpose and with the intent to defraud McDermott's creditor's; that plaintiff, being ignorant of this fact, and relying on defendant's representation, paid his money, took the assignment, and by reason of such false representation was injured and sustained damage to the amount of one thousand two hundred and three dollars and eighty two cents and its interest. But defendant says that this special count is not good on demurrer because it shows plaintiff to have been a *bona fide* assignee of the note and mortgage for value, without notice of the fraud of defendant, and therefore according to the case of *Holmes v. Gardner*, 50 Ohio St. 167, (33 N. E. Rep. 644) he would have been entitled to protection against the claims of the general creditors of McDermott, the fraudulent mortgagor; and that he failed to get such protection, and lost his mortgage debt by his own fault, in

not confessing the fraud charged against McDermott, the fraudulent mortgagor, and defendant, Welty, the fraudulent mortgagee and avoiding it by replying that he (plaintiff) was a *bona fide* assignee of the note and mortgage for value, without notice. But can defendant set up as defense here, plaintiff's failure to thus confess and avoid defendant's own fraud? Does it not come within the meaning of the maxim that a party alleging his own fraud is not to be heard? Still, passing this by, I think the complete answer to the above contention is that by the averments in this count, he did not know that such charge of fraud made by the defendants in plaintiff's Ohio suit to foreclose was well founded and true, until it was shown to be so by the decision of the court. Therefore, he met such charge by a direct denial, because he did not know and had no ground to believe it to be true.

It also appears, and is so averred in plaintiff's special count, that at the time of plaintiff's purchase from McDermott and before plaintiff's purchase from Welty of the notes and mortgages, Dubois & McCoy had obtained a judgment against McDermott which was a lien on said real estate at the time of plaintiff's purchase, but of later date than the three mortgages, and of dignity inferior to them. After plaintiff's purchase of the land, the land was sold on execution under the judgment lien of Dubois & McCoy, and was bought by them; so that, at the time of plaintiff's purchase of the notes and mortgages, Dubois & McCoy were not general creditors of McDermott, but were the holders of a specific lien upon the real estate in question, with rights definitely ascertained and fixed against such real estate, with the right as against Welty, to have his mortgages reduced to the true amount due thereon. And the fact then being that one of them was without consideration, and therefore void as to them, the question arises, could Welty make it valid, and displace their lien by assigning it to a purchaser for value, without notice of the fraud rendering void the title of such assignor? It seems to me that the reason of the rule as given in *Holmes v. Gardner* would not then exist, for Dubois & McCoy were not general creditors, but were judgment creditors with a specific lien against the land. They

have no longer trusted to the personal responsibility of their debtor, McDermott, but have fastened their debt upon his land, subject, it is true, to valid prior liens, but not subject to invalid ones. Now, if any one bought from McDermott he would pay his money upon the faith of the debtor's actual title to the specific property transferred, but subject to the judgment lien; and such purchaser for value, acting in good faith, could not get rid of the judgment lien by putting money in the debtor's pocket to take its place. Could he at that stage, for value and good faith, buy from a fraudulent mortgagee a mortgage and note which was in the mortgagee's hands fraudulent and void as against the judgment creditors, and thus make a worthless lien good against the judgment lien made specific and fixed? If Robinson could have done this, was he compelled to do so to protect Welty in retaining money he had fraudulently obtained? For if Welty had been a party to the suit to foreclose, and Robinson had set up and had allowed against the judgment lien of Dubois & McCoy his claim of being a purchaser for value of Welty's mortgage, without notice of the fraud rendering void Welty's title, the court would certainly at the same time have decreed that Welty should pay to Dubois & McCoy the one thousand two hundred and three dollars and eighty two cents, as received by him from Robinson, to stand as a substitute for that much of the value of the land. See *Bean v. Smith*, 2 Mason 252 (274 Fed. Cas. No. 1,174). So that such decree would have placed the parties Dubois & McCoy, Robinson and Welty exactly where the court now finds them, as the result of the suit to foreclose and of the judgment here complained of; and thus both innocent parties would have been made whole, and the wrongdoer alone made to suffer. Any other result in such a state of facts than the one at least ultimately holding the wrongdoer bound to make good the loss would be putting it in his power of his own motion when he saw fit of profiting by his own wrong. If this view of the law is correct, then Robinson was not compelled to set up as against Dubois & McCoy the fact that he was an innocent purchaser for value, but could give their judgment its proper place as against the fraudulent mortgage and look to Welty,

his assignor, as the one in justice ultimately liable; and if so, it does not lie with defendant to complain of plaintiff putting himself to the trouble, delay and expense of placing the loss where it ultimately belongs.

Was it error to admit the record? Robinson brought this suit to foreclose in the court of common pleas of the county of Belmont, of the State of Ohio, where the real property under mortgage lies; making parties defendant John J. McDermott and Mary Ann, his wife, the mortgagors, and Dubois & McCoy, judgment creditors of McDermott, who had execution on their judgment levied on the real estate as the property of McDermott, had the same sold, and became the purchasers thereof. A transcript of this record, duly certified, was offered in evidence by plaintiff, to which defendant objected; but the court permitted it to go in evidence for the purpose of showing the fact that such judgment was rendered, but reserving the question of its effect as an estoppel, and the defendant excepted. The suit for the sale of the real property under the mortgage was brought in Belmont county, where the lands lie, as required by the law of Ohio (2 Rev. St. Ohio, § 5022); and there the defendants in the suit resided. The defendants Dubois & McCoy, among other things answered that there was not due on the two thousand dollars mortgage the sum of one thousand two hundred and three dollars and fifty five cents or any other sum, but that said mortgage was totally without consideration, and was given by McDermott and received by Welty as a void mortgage, and for no valuable consideration; and this was proved by the deposition of Welty, taken and read in the case, with nothing to contradict it or show it to be otherwise; hence the court, by decree of 26th April, 1888, held the two thousand dollar mortgage to have been given without consideration, and to be entirely void as against Dubois & McCoy. The record certainly proves that such a decree was rendered, and defendant, Welty, in his evidence in this suit, says that the mortgage was without consideration and void. The record proves itself, and that Robinson lost his mortgage, for which he had paid one thousand two hundred and three dollars and fifty five cents, as the sum remaining due there-

on; and defendant, Welty, in this case, says that under the pleadings and evidence in the suit to foreclose, the judgment is right, but that plaintiff ought not to have recourse on him, because plaintiff did not set up in that suit the fact that he was a purchaser for value without notice of the fraud of defendant, his assignor, rendering void his title.

In such a state of facts, and with the view of the law already given, I can not see that it makes any difference in this case that the defendant was not a party in that, or that he had no proper notice to appear, make himself a party, and defend and resist the claim of Dubois & McCoy, for his own showing, if he had been a party, and had set up the fact that Robinson was a purchaser for value without notice, the court would, in any event, have given a decree against him, as the one ultimately liable, for the one thousand two hundred and three dollars and fifty five cents; for, if such plea availed, then he had Dubois & McCoy's money as standing in the place of the property fraudulently withdrawn; if not, then he had the money obtained by fraud from Robinson. If this view be correct, it is not necessary to discuss the question whether he received sufficient notice to defend the claim set up in the foreclosure suit against the validity of the mortgage assigned by him, or, if sufficient, whether it was his duty in some way to cause such defense to be made. The record was at least competent evidence, though the judgment may not be conclusive. See *Sibley v. Hulbert*, 15 Gray 509.

There is still another view that may be taken. The negotiable note and mortgage were transferred and assigned by defendant, Welty, to plaintiff, Robinson, by a separate written instrument; and although Robinson took them as a purchaser for value, without notice of the fraud rendering void, as against the creditors of McDermott, the title of Welty, his assignor, Robinson, did not take the note by endorsement, and McDermott was apparently insolvent, and had become a non-resident of both states. The evidence also shows that plaintiff, Robinson, before the assignment, had bought the property of McDermott, and had taken a conveyance; that Dubois & McCoy then had a judgment lien; and that Robinson was applying the purchase money in taking

up the liens prior to the judgment for his own protection; and that he bought defendant's two thousand dollar mortgage, not because it was good against McDermott, who had no other property, but because it appeared upon its face to be a valid and subsisting lien, and was so represented to the extent of one thousand two hundred and three dollars and fifty five cents. Did not such representation, which could be made by acts and conduct as well as by words, form the sole basis of the sale, and did not the assignment under such circumstances plainly presuppose and guaranty it to be a valid and subsisting lien to that amount? Having turned out to be a nullity for the purpose for which he bought it, there having been a total failure of consideration, why may he not recover back the purchase money? No part of the two thousand dollars had ever been paid. Why count up any sum as the balance due on it if it were not for the purpose of assuring the plaintiff of the truth that it was a valid lien, and one still subsisting to the extent of such balance? Why should not the jury be allowed to take such representation, such acts and conduct, as put forward by Welty in order to induce Robinson to make the purchase, and believe that Robinson knowing nothing to the contrary and relying upon them made the purchase? It was a question of fact for the jury. See *Croyle v. Moses*, 90 Pa. St. 250; *March v. Wilson*, Busb. 143; *Bigelow Frauds*, 467. Robinson had bought the property, and wished to know the valid and subsisting liens against it, so that he could lift them by assignment to himself with the purchase money. The balance due on his mortgage was a fact peculiarly within the knowledge of Mr. Welty. Could not the jury say that he was bound to make good his representation in that regard—in other words under the common count, treat his representation as a warranty that it was *pro tanto* a valid and subsisting mortgage? In this view it might be regarded as an action brought for a rescission, or rather as based upon a repudiation of the contract of assignment, on the ground of a misrepresentation of the material fact of the validity of the two thousand dollar mortgage, and a total failure of the consideration. In that view of the case, where rescission is claimed and a res-

toration of the money paid, it would be only necessary to prove that there was such misrepresentation, and an adjudication that the mortgage was fraudulent and void. Then, however honestly it may have been made, however free from blame the person who made it, the contract, having been made by misrepresentation, can not stand. See *Derry v. Peek*, L. R. 14 App. Cas. 337-359; also, *Brownlie v. Campbell*, L. R. 5 App. Cas. 935. In such case the averment or proof of *scienter* is not necessary. See Bigelow, Frauds 520. That for which Robinson paid his money proved to be, not a valid and subsisting lien on the property to the extent of a balance of one thousand two hundred and three dollars and eighty two cents as against the other lienors, but a mere nullity as against the judgment of Dubois & McCoy. In such case the contract of assignment could be and was treated by Robinson as voidable and as rescinded, and he was entitled to recover back his money on the count for money had and received, because it was entered into on the faith of a material representation, which was false in fact (see Benj. Sales, § 429; Bish. Cont. § 71); for he did not get what he contracted for, viz.: a note and mortgage, with one thousand two hundred and three dollars and eighty two cents due on it, and valid and binding as against every one as it appeared on its face, but one wholly without consideration and void for the purpose for which he bought it (see Bish. Cont. § 71).

If one sells a promissory note, the law implies the warranty that it is not forged, but genuine and binding on the parties, and not subject to any legal defense; yet in the absence of fraud, there is no warranty of the maker's solvency or ability to pay. Bish. Cont. § 245. This count alleges that after the mortgage had been, in the Ohio suit, adjudged to be null and void, and the one thousand two hundred and three dollars and eighty two cents had become to plaintiff wholly lost, the defendant, treating the assignment as rescinded or repudiated, with full notice of all the facts, undertook and promised to pay. A misrepresentation without the *scienter* ceases to be innocent when the party who made it undertakes, after learning of its falsity, to maintain the advantage gained by means of it. 1 Bigelow, Frauds 520. See *Street v. Blay*, 2

Barn. & Adol. 456, cited in *Cutter v. Powell*, 1 Smith Lead. Cas. (9th Ed.) 1226. But see 1 Tuck. Comm. Laws Va. 338. I take the true distinction to be that where the plaintiff has the right to repudiate the contract of assignment of the mortgage upon the ground that it is a nullity, and he has nothing but the warranty that it is valid, he would not be required to bring special *assumpsit* for the breach of the express contract, but may recover at law in *indebitatus assumpsit* as for total failure of consideration; but no opinion is or need be expressed on this point.

When the plaintiff had closed his evidence in chief, defendant moved to exclude it from the jury. If this was meant as a denial of its sufficiency, and that the court should in that way instruct the jury to return a verdict for the defendant, the exception taken to the overruling of the motion was waived by defendant going on with his own evidence. See *Core v. Railroad Co.*, 38 W. Va. 456 (18 S. E. Rep. 596). If it was meant to object to the evidence as irrelevant or otherwise inadmissible, none such was pointed out except the record of the judgment of foreclosure, and that was only admitted for the purpose of showing the fact that such a judgment had been rendered; and, as we have already seen, it was, when taken in connection with defendant's own testimony in this suit, relevant and proper. Defendant claimed that plaintiff knew, when he took the assignment of the two thousand dollar mortgage and note, that it had been given and taken with the intent to delay, hinder and defraud the creditors of McDermott, the mortgagor, and that nothing in fact was due, and that he also knew that of the one thousand two hundred and three dollars and eighty two cents, one thousand dollars was to be and was turned over to Mrs. McDermott. This was the turning point in the case, and upon it the evidence *pro* and *con* was conflicting; hence the extent to which it figures in the hypothetical state of facts upon which the five instructions given are based. It is enough to say that there was evidence tending to prove the hypothesis of facts upon which these instructions are founded; and we are of opinion that taken as a whole, they state the law of the case supposed, with substantial correctness; and, view-

ing the case from the standpoint of the evidence not controverted, of the special finding of the jury, and the tendency of the evidence on other points, we can see no error, if any at all, which could be to the prejudice of the defendant.

Finally, did the court err in refusing to set aside the verdict as contrary to the evidence? On the general issue of *non assumpsit* there have been two trials and two verdicts. On the first trial the jury were required to answer in writing the following question: "At or before the time when the notes and mortgages were assigned by defendant, Welty, to plaintiff, Robinson, did Welty, either personally or through Schafer, in Welty's presence and with his assent, make any false and fraudulent misrepresentations with reference to the two thousand dollar note or mortgage?" The jury on the first trial answered this important question with emphasis in the negative, returning their answer in writing with their verdict for the defendant. This important finding is not to be found in this record, for reasons given in the case of *Welty v. Campbell*, 37 W. Va. 797 (17 S. E. Rep. 312).

This verdict was set aside, and a new trial awarded. And on the second trial the jury found for the plaintiff, and, in answer to the same special questions, returned in writing the following answer, "Yes, we think these papers were misrepresented at the time of the assignment."

It is certainly not intended in this case to say anything harsh in regard to Mr. Welty. The answer of the first jury, which might be more reliable, is not before us. We must look only to the answer of the second jury on this vital point. We must, on this hearing of this writ of error, consider all the evidence before us. Code (Ed. 1891) c. 131, s. 9. But the general rule is that the verdict ought not on that ground be disturbed, unless the court can plainly see that the verdict is without evidence on some essential point, or that there is a clear and decided preponderance of evidence against the finding of the jury.

On this vital point, as we have already seen, the evidence is conflicting, as well as the verdicts; but the last is the only one before us, and, under the rule as announced, we are of opinion it must stand as a finding on the issue and of the damages by them assessed. Judgment affirmed.

CHARLESTON.

UNION TRUST CO. v. McCLELLAN.

Submitted January 19, 1895.—Decided April 3, 1895.

1. NEGOTIABLE NOTE—ACCOMMODATION PAPER—BURDEN OF PROOF.

Where it is shown in evidence that a certain negotiable promissory note was made and delivered to the payee at his instance, and for his accommodation for a specific purpose, and that such payee without the knowledge and consent of the maker, used such note for a different purpose, the burden is on the holder of such note to show that he received it in the ordinary course of business, before maturity, for value, without notice of its wrongful misuse by the payee, before he can recover from the maker.

2. NEGOTIABLE NOTE—VALUABLE CONSIDERATION—PRE-EXISTING DEBT.

A pre-existing debt is not such valuable consideration as will protect the holder of a negotiable note wrongfully pledged as collateral security by the payee.

3. WITNESS—MATERIAL FACT—CONCLUSIVE PRESUMPTION.

Where the burden is on a party to a suit to prove a material fact in issue, the failure, without excuse, to produce an important and necessary witness to such fact, raises the conclusive presumption that such witness' testimony, if introduced, would be adverse to the pretensions of such party.

JOHNSON & HALE for plaintiff in error, cited 1 Par. Bills. & N. 188; 2 Par. Bills & N. 105; Smith Transf. Neg. Pa. 7; 28 W. Va. 333; 35 W. Va. 391; 13 W. Va. 261; 35 W. Va. 260; 1 Par. Bill & N. 501; 23 W. Va. 90, 97; 21 W. Va. 455; 10 W. Va. 662; 12 W. Va. 772, 611.

A. W. REYNOLDS for defendant in error, cited 1 Greenl. Ev. § 82; 27 W. Va. 17; 83 Pa. St. 248, 372; 106 Pa. St. 170, 173; 118 Pa. St. 565; 151 Pa. St. 228, 229; 26 Atl. Rep. 186; 3 Am. & Eng. Enc. Law 542; Code, c. 13, s. 14; 14 Sup. Ct. Rep. 816; 31 W. Va. 662; 24 W. Va. 606; 17 W. Va. 683; 14 W. Va. 708; 18 W. Va. 1, 766; 27 W. Va. 75; 32 W. Va. 120; 34 W. Va. 155; 8 W. Va. 373; 6 W. Va. 388; 7 W. Va. 348.

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DENT, JUDGE:

A suit brought by the Union Trust Company against J. L. McClellan on a certain promissory note, in the Circuit Court of Mercer county, resulted on the 24th day of February, 1894, in a judgment for the defendant, from which the plaintiff obtained a writ of error, and here relies on the following prolix and argumentative assignment, to wit: "*First.* The court erred in permitting the defendant to read as evidence to the jury the deposition of Wm. B. Reed, over the objections of the plaintiff. This deposition was wholly immaterial and irrelevant. This suit was brought upon a note negotiable under the laws of the state of Pennsylvania. The plaintiff was the owner thereof, having taken it for value, and this deposition undertakes to explain the circumstances under which it was executed by the defendant to the said Wm. B. Reed, the payee thereof. *Second.* The said Circuit Court erred in permitting the defendant to testify before the jury in explanation of the circumstances under which he executed the said negotiable note to the said Wm. B. Reed, over the objection of the plaintiff. *Third.* The court erred in permitting the defendant to testify to the jury why the said Reed proposed to give to the said defendant five hundred shares of stock in the Fottrell L. W. C. Company, over the objection of the plaintiff. This was wholly irrelevant and immaterial, and tended to lead away the mind of the jury from the issue in the case. *Fourth.* The court erred in permitting the defendant to testify before the jury as to the opportunity that the plaintiff had to see the defendant in Philadelphia, and as to the number of times they passed by the plaintiff's place of business while in Philadelphia, and as to where he first found out that the note sued on in this case had not been used according to the contract between him and the said Reed, and as to how long it was before the first action was brought on said note, over the objections of the plaintiff. *Fifth.* The court erred in refusing to strike out the whole of the examination in chief of the defendant. *Sixth.* The said court erred in refusing to strike out the whole of the defendant's evidence in this case, and direct the jury to find a verdict for the plaintiff, because it presented no valid de-

fense. This practice was approved by the court of appeals of this state in the case of *Spencer v. Rose*, 28 W. Va. 333. *Seventh.* The court erred in permitting the defendant to testify to the jury in surrebuttal that he had never executed the note referred to in the deposition of D. Howard Foote, read in the case before the jury. *Eighth.* The court erred in refusing to give to the jury, at the instance of the plaintiff, instructions Nos. 1, 2, 3, 4 and 5. It was clearly error in the court in refusing to give these instructions, especially so as to No. 3. There was evidence in the case showing that the note sued on was endorsed to the plaintiff by the payee, Reed, for a consideration, and there was evidence showing or tending to show that a consideration passed from the payee, Reed, to J. L. McClellan, the maker thereof, and there was evidence tending to show that Reed, the payee, practiced a fraud upon McClellan, the maker; and it is hard to conceive why the court rejected this instruction, which was intended to meet this view of the case. *Ninth.* The court erred in giving to the jury instruction No. 1 for the defendant. This was clearly erroneous. It garbles the facts, and violates a well established principle. It put prominently before the jury parts of the evidence, and ignored other parts of the evidence. It is long, prolix and hard to understand, and does not propound the law correctly. *Tenth.* The verdict was contrary to the evidence in the case. Wm. B. Reed in his deposition says that the note was given him for the purpose of having it discounted; and he further said in his deposition that said note was used by him in paying for stock in the Fottrell L. W. C. Company for the defendant. The whole evidence in the case shows that the note sued on was either based on valuable consideration to the defendant, the maker, or that it was an accommodation note given by the defendant to accommodate his friend, Wm. B. Reed, and in either event the verdict should have been for the plaintiff."

No other errors were assigned at the bar, and, as none are apparent from the record after careful inspection, it must be presumed they do not exist, as the able counsel for the plaintiff would not have overlooked them.

The four instructions asked for plaintiff and refused, are

as follows, to wit: "Instruction No. 2: The court further instructs the jury that if they believe from the evidence in this case that the note sued on in this case was made and delivered by the defendant, McClellan, to Wm. B. Reed, as payee, for the personal accommodation of said Reed and with the understanding that the said Reed should use the said note for the purpose only of paying for or showing to the stockholders of the Fottrell Insulating Wire Cable Company that five hundred shares of the capital stock of said company had been paid for by the said defendant, or the said defendant and said Reed jointly; and the jury shall further believe from the evidence in this case that the said Reed, with said understanding, which he made known to the plaintiff at the time he negotiated said note to the plaintiff, and that he did, before the maturity of said note, negotiate the same to the plaintiff for value by getting the money thereon, by having the same discounted, and getting the money, or by having his own note discounted, and at the time of such discount, and in part consideration thereof, he, Reed, deposited the note in suit as collateral security—then the jury should find for the plaintiff. Instruction No. 3: The court instructs the jury that if they believe from the evidence in this case that the note sued on in this case was taken by Reed, the payee, for valuable consideration, and that the said Reed indorsed and delivered the said note to the plaintiff for valuable consideration, then the plaintiff has the right to recover on said note, unless they further believe from the evidence in this case that the said Reed procured said note from the defendant through fraud, and that the plaintiff, at the time it took said note, knew of said fraud, and the burden of proving said fraud and notice is on the defendant. Instruction No. 4: The court instructs the jury that if they believe from the evidence in this case that the note sued on in this case was made by the defendant J. L. McClellan to W. B. Reed, as payee, and that said note was made for the purpose of discount, and that the said Reed, before the maturity of the said note, indorsed and delivered the same for value to the plaintiff, Union Trust Company, then the said plaintiff is entitled to recover in this case, unless the jury shall believe

from the evidence in this case that the said note was obtained by the said Reed from the said McClellan by fraud, and that the plaintiff had knowledge of such fraud when it took the said note from the said Reed; and the burden of proving fraud is on the defendant. Instruction No. 5: The court further instructs the jury that if they believe from the evidence in this case that the plaintiff took the note in suit before its maturity, for value, and without notice of any equities (if the jury from the evidence shall believe any equities existed) between the defendant McClellan and W. B. Reed, the payee of said note, then the plaintiff is entitled to recover in this case, and the jury should so find." Indorsement on this instruction by the judge of the court: "This instruction is refused upon the ground that it is abstract, and submits to the jury questions of what equities are, and tends to mislead it—the jury. R. C. M."

The instruction given for defendant over objection of plaintiff is as follows: "Defendant's instruction No. 1: The court instructs the jury that if they believe from the evidence in this case that the defendant, J. L. McClellan, made and delivered to W. B. Reed, payee, the note sued on in this case, that it might be indorsed by him, said Reed, and delivered to the Fottrell Insulated Wire and Cable Company at a then proposed meeting of the stockholders thereof, in order to have the books of said company to show that said McClellan had fully paid up for five hundred shares of the capital stock of said company; and if the jury further believe from the evidence that the said W. B. Reed had agreed, or did agree, that he would give said five hundred shares of said capital stock to said McClellan in consideration of certain sales that McClellan had made for said Reed of Penn placer mining stock; and if the jury believe from the evidence that the said note was made by said McClellan and received by said Reed for the purpose aforesaid, and for no other purpose, and that it was the contract and agreement between said Reed and said McClellan at the time said note was made and delivered that said note should be used for said purpose, and none other; and if the jury further believe from the evidence in this case that said Reed agreed with said McClellan, at the

time of the making and delivery of the note sued on in this case, that he, said Reed, would pay the amount of said note to said Fottrell Insulated Wire Cable Company, and that said McClellan should not pay the same; and if the jury further believe from the evidence in this case that the said W. B. Reed, in violation of his said contract with McClellan, instead of using said note for the purpose aforesaid, indorsed and delivered the said note to the plaintiff in this case; and if the jury believe from the evidence in this case that said endorsement and delivery of said note was made to one M. S. Stokes by said Reed, that said Stokes was at the time the treasurer of said plaintiff, the Union Trust Company, and was authorized to act for said plaintiff, and did act for it in said negotiation, and received said note from said Reed for said company, and that at the time said Stokes so received said note from said Reed said Stokes knew of the specific purpose for which said note was executed, and the facts and circumstances attending its making and delivery aforesaid—then the jury should find for the defendant in this case, notwithstanding they may further believe from the evidence in the case that the plaintiff paid a valuable consideration to said Reed for said note.”

The facts clearly established by the evidence are as follows: W. B. Reed feeling himself under obligation to the defendant for certain services rendered by the latter in disposal of certain shares of stock, agreed to give him five hundred shares of stock in the Fottrell Insulated Wire Cable Company; and he obtained from the defendant the following note: “\$1,000. Oct. 21, 1889. Ninety days after date I promise to pay to the order of W. B. Reed at the * * * one thousand dollars, without defalcation, value received. J. L. McClellan.” Indorsed: “Protest waived. W. B. Reed”—to show the directors of the company that the stock promised defendant was fully paid, and then he would pay for the stock in a few days, and take up the note. That said Reed then took said note, which was negotiable under the laws of Pennsylvania, the place of making being Philadelphia, and transferred the same to the plaintiff, either as collateral security for his own note, executed for money then

borrowed, or for a pre-existing debt. That defendant resided in Norristown, seventeen miles out of the city, and remained at Philadelphia until March 1, 1890, and, except that Reed informed him that he had paid off the note, he heard nothing from it, and never knew it was held by the plaintiff, until May, 1891, after he had moved to West Virginia, shortly before suit was brought upon it.

There are some disputed questions of fact in the case. Mr. Reed, the payee of the note, says that he assigned and delivered the same to one M. S. Stokes, secretary and treasurer of the plaintiff, as a collateral security for his own note, executed at the same time; that Mr. Stokes knew the purpose for which the McClellan note was executed, and at first objected, but finally took it. D. Howard Foote testifies that he was assistant treasurer of the Union Trust Company during the year 1889 (in his first deposition) and that W. B. Reed brought the note to the company, and obtained a loan on it. His deposition was taken a second time January 11, 1894, and he then testified that it was given in renewal of another note of defendant. Reed and McClellan both testify that they never gave any such prior note as the witness Foote refers to in his last deposition. There are other matters of controversy in this case, but these are all that are necessary for its correct decision.

It is the settled rule of commercial law that where a negotiable note is given for a specific purpose, is endorsed and used by the payee for an entirely different purpose, without the knowledge or consent of the maker, the burden of proof is on the holder of such note to show that he received it in the ordinary course of business before maturity for a valuable consideration, and without notice of its misuse by the payee before he can recover from the maker. Also that one who takes an accommodation note as a collateral security for an antecedent debt is not a holder for value. Such is at least the law of Pennsylvania, where the note in controversy was executed. *Bank v. Dunn*, 151 Pa. St. 228 (25 Atl. 80); *Hart v. Trust Co.*, 118 Pa. St. 565 (12 Atl. 561); *Carpenter v. Bank*, 106 Pa. St. 170; *Royer v. Bank*, 83 Pa. St. 248; *Wardell v. Howell*, 9 Wend. 170; *Coddington v. Bay*, 20 Johns. 637.

In the case of *Woodhull v. Holmes*, 10 Johns. 230, it was laid down as a rule that "a party to negotiable paper may be a witness to prove facts subsequent to the due execution of the note, and which destroy the title of the holder." Defendant McClellan, was a competent witness to show why the note was executed, and that it was afterwards misapplied by the payee. Having done this, both by the testimony of himself and the payee, Reed, the burden was then on the plaintiff to show that it was a *bona fide* holder before maturity, for value, without notice.

Plaintiff's second, third and fourth instructions were properly refused for the reason that they sought to cast the burden of proving both fraud and notice upon the defendant. The second instruction goes so far as to claim that even if the plaintiff had notice, it was entitled to recover. The fifth instruction was properly refused for the reasons given by the court, that it was abstract, uncertain and would tend to mislead the jury. All these instructions ignore many of the facts in the case, and were properly refused for this reason. *Storrs v. Feick*, 24 W. Va. 606; *McMecken v. McMecken*, 17 W. Va. 683.

The instruction given for defendant, while it is long, yet it is hard to see how it could be any shorter, and properly state the case from the defendant's standpoint. It is too plain for the jury to have been misled by it, and it correctly propounds the law. There can not be the possibility of a doubt but what this case was rightly decided both by the jury and the court. The preponderance of the evidence is clearly in favor of the defendant. The plaintiff appears to have entirely ignored the law that the burden was upon it of proving want of notice of the fraud vitiating its title. The only witness it could have proved this by was M. S. Stokes, its former secretary and treasurer, with whom Mr. Reed says he dealt when he transferred the note to the plaintiff, and whom he says had full knowledge of the purposes of its execution. Not only does this prove notice, but the presumption of the law is that Mr. Stokes would have so testified if his evidence had been taken; and it was suppressed for this reason. "No rule of law is better settled than that a party

having it in his power to prove a fact, if it exist, which, if proved would benefit him, his failure to prove it must be taken as conclusive that the fact does not exist." *City of Wheeling v. Hawley*, 18 W. Va. 472; *Hefflebower v. Detrick*, 27 W. Va. 16. And much more is this the case where the burden is on the party who fails to produce the only witness to the fact.

It is true that the evidence of D. Howard Foote is taken twice on this subject. But his statements are contradictory and uncertain, and he is contradicted by both McClellan and Reed, all of which made the testimony of M. S. Stokes the more necessary, and the presumption of the adverse character of his testimony the stronger.

Of two innocent sufferers from the wrong of a mutual friend the defendant, from the evidence, has the better right, and for this reason the judgment is affirmed, there appearing no error in the record prejudicial to the plaintiff.

CHARLESTON.

WILSON v. PHOENIX POWDER MANF'G CO.

Submitted January 15, 1895—Decided April 3, 1895.

1. NUISANCE—NEGLIGENCE.

A mill manufacturing powder and other explosives, and storing the same on the premises, situate on the bank of the Ohio river and near two railroads and a public road, is a public nuisance, and any one injured in property by explosion of powder stored there may recover damages without proof of negligence in its operation.

2. EVIDENCE—UNNECESSARY ALLEGATIONS—SURPLUSAGE

Allegations of facts not necessary to maintain an action or defense are immaterial and surplusage, and need not be proven.

3. EVIDENCE—AUTHENTICATION OF PAPERS.

Where a judge is *ex officio* clerk of a court, then both certificates specified in section 19, chapter 130, Code, are not required, his certificates as judge being sufficient.

40	413
40	714
40	413
42	606
40	413
43	542
40	413
47	196
40	413
52	407
40	413
54	153
40	413
60	697

40	413
164	235

4. EVIDENCE—JUDICIAL NOTICE—LAW OF FOREIGN STATE.

Under section 4, chapter 13, Code, courts take judicial notice, without proof, of the law of another state, and in so doing may consult any book purporting to contain, state, or explain the same, and consider any testimony, information or argument offered on the subject.

5. EVIDENCE—FOREIGN DEED—CERTIFICATION.

Original deeds made outside of this state, and so certified as to warrant recordation in this state, are admissible in evidence here.

6. POSSESSION—EVIDENCE.

Actual possession being an element of complete legal title to real estate is *prima facie* evidence of such title in the possessor. One in such position may maintain trespass or trespass on the case for damage thereto, without further proof of his title.

7. POSSESSION—TRESPASS.

Either actual or constructive possession will maintain trespass for damage to realty.

8. EVIDENCE—ESTOPPEL—ANSWER.

An answer in chancery in another suit is admissible as evidence of an admission therein in behalf of one though not a party to the suit in which it was filed, though it would not be admissible as an estoppel under the principle of *res judicata*.

SIMMS & ENSLOW for plaintiff in error, cited Code, c. 130, ss. 20, 21; 1 Johns. 78; 18 B. Mon. 800; 15 Wall. 537; 33 N. W. Rep. 224; 25 N. E. Rep. 259; 21 N. E. Rep. 864; 15 W. Va. 676.

MARCUM, PEYTON & MARCUM for defendant in error, cited 74 Pa. St. 230; Wood's Law of Nuisance (2d Ed.) § 69; 80 N. Y. 579; 36 Am. Rep. 654; 6 Hill 292; 19 Am. St. Rep. 34, 39, note; 36 Am. Rep. 508; 26 W. Va. 110; Id. 236; 3 Am. Dec. 296; Ohio Rev. Stat. (1890) § 533; Ohio Const. Art. IV. § 16; U. S. Rev. Stat. §§ 905, 906.

BRANNON, JUDGE:

The Phoenix Powder Manufacturing Company was sued in an action of trespass on the case in the Circuit Court of Wayne county by John G. Wilson, to recover damages to Wilson's dwelling house and other buildings resulting from an explosion of powder stored in buildings of the defendant company. The jury found a verdict for the plaintiff, subject to the defendant's demurrer to the plaintiff's evidence, on

which demurrer the court gave judgment for the plaintiff, and the defendant resorted to the writ of error which we now decide.

There was no evidence to show negligence on the part of the defendant in the operation of its powder mill or in the storage or handling of its powder, and thus the question arises whether the plaintiff can recover by showing only the presence of the mill in the location it occupied, the storage of powder there, its explosion, and the consequent damage to the plaintiff's property, without proof of negligence.

Was the defendant maintaining a public nuisance? If it was, it was engaged in the commission of a public wrong; and, injury resulting therefrom to the plaintiff, the defendant must repair such injury.

Powder and nitroglycerine are commodities of essential, if not primary, importance from their wide use in war and in the construction of railroads, roads, buildings and other varied uses, and their manufacture is a business entirely respectable and indispensable; but that consideration is not all controlling; that consideration is not alone to be regarded. The rights and safety of those not engaged in their manufacture must not be forgotten. They are agents of magical power and wrath. When the spark or touch of ignition meets them, their subtle force is awakened to instantaneous action—an action giving no warning, and so potent that almost in the twinkling of an eye, before thought of self preservation can come, it wastes man and his home and his savings with irrepressible energy. Often the explosion comes from causes not discernible, which reasonable foresight or prudence can not see. Valuable as are these giants as auxiliaries to man in his great works, they must be limited to places and bounds of safety.

Here is a mill, making powder and other explosives, standing right on the bank of the Ohio river, upon which, day and night, boats bear thousands of precious lives and thousands of dollars of property, about two hundred yards from the great Chesapeake & Ohio Railroad and about three hundred yards from the Huntington & Big Sandy Railroad, both great highways of the public, with trains filled with passengers

and property passing over them almost hourly, and about seventy five yards from a country road, also a highway in constant use. Six explosions occurred at this mill within three years, showing that it was a constant menace to life and property for a wide range around it, within which many people lived and worked, as its explosions threw large pieces of iron and large timbers out into the river, and some clear across into the town of Burlington, about one half mile away on the Ohio bank of the river, and into fields in Ohio, a mile distant. The buildings of the plaintiff which were injured in the explosion involved in this suit stood in Burlington. These explosions have injured many houses in Ohio, by shaking and jarring, damaging chimneys, walls, plastering, *etc.*, from the force of concussion. Some of the explosions were terrible in their power and shock. This powder mill, with its great quantity of explosives in its storehouse, was a constant danger impending over those highways and all lawfully using them, and the people living in the neighborhood within the danger limit—an ever present peril, day and night.

The manufacture and keeping of quantities of gunpowder, nitroglycerine and other explosives in or dangerously near to public places, such as towns or highways, is a public nuisance and indictable as such. It makes no difference whether carefully or negligently conducted and managed. Negligence is here no material element. If damage happen to a person from explosion, the injured party is entitled to compensation without proving negligence on the part of the defendant. He is injured by that which breaks the law—the law against public nuisance. He is in no fault, while the other man is, and he has received damage from that other man's wrongful act. He has a right to immunity from this injury, and the other man owed him the duty of securing him immunity. The state is wronged by the maintenance of a nuisance which may at any moment take the lives and destroy the property of its people passing and repassing over its highways, and reposing and working in their accustomed places, and the particular person hurt has special cause of complaint, because he is especially injured. *Talbott v. King*, 32 W. Va. 6 (9 S. E. Rep. 48).

It is true the manufacturer owns his mill, and is engaged in lawful and honorable business; but he has violated that maxim, centuries old in the law, yet vital and indispensable in organized society, where everyone must use his property to earn bread, "*Sic utere tuo ut alienum non laedas*" (So use your own property that you injure not another). This lawful but dangerous business, being carried on where it is, is a public nuisance. No care can exempt it, situated where it is, from the charge of being a nuisance. Wood, Nuis. § 69; *Wier's Appeal*, 74 Pa. St. 230; *Heeg v. Licht*, 80 N. Y. 579; *Myers v. Malcolm*, 6 Hill 292; *Powder Co. v. Tearney*, 131 Ill. 322 (23 N. E. Rep. 389); 19 Am. St. R. 34 and note p. 39; *McAndrews v. Collerd*, 42 N. J. Law 189.

In *McAndrews v. Collerd*, *supra*, the opinion says that "keeping powder, nitroglycerine, or other explosive substances, in large quantities, in the vicinity of a dwelling house or other place of business, is a nuisance *per se*, and may be abated by action at law or injunction in equity, and, if actual injury results, the person keeping them is liable therefor, even though the act occasioning the explosion is due to other persons, and is not chargeable to his personal negligence." The reason is the act is wrongful, fraught with danger all the time, and it is illogical to call on one who, free from fault, has been injured to prove that the party who injured him conducted a business confessedly unlawful in a careless manner, and just wherein he was careless. His whole action is negligent from being wrongful, so to speak. The authorities above cited dispense with proof of negligence by the plaintiff. Later New York cases overrule the case of *People v. Sands*, 1 Johns. 78, in this regard.

Now, if this mill were located in a secluded place—one removed from highways—being in itself a lawful business, the case would be different; it would not be a public nuisance, and to recover injury from an explosion I apprehend the plaintiff must show negligence on the defendant's part. But it is contended that as the declaration alleges negligence on the part of the defendant, it must be proven. That allegation was unnecessary, immaterial and surplusage, and the law does not require anything but material allegations to be

proven. *State v. Howes*, 26 W. Va. 110; *State v. Hall*, 26 W. Va. 236; 1 Greenl. Ev. § 51.

Another matter in the case relied upon as error is the introduction in evidence of a copy of a will to show title in the plaintiff to the premises injured. It was probated in Ohio, and it is said that it is insufficiently authenticated in the fact that, though certified as a full, true copy by the probate judge it wants the clerk's certificate, both being required by section 19, chapter 130, Code. By the constitution of Ohio and its statute law, the probate judge is also clerk of the probate court, and keeper of its books and papers. This same person could make two certificates, but that would seem useless. The object of the statute in requiring two certificates is to double the probability of truthful certification; but this can not be done where one man fills both places, the statute requiring the judge of the same court to certify that the clerk's certificate is in due form. It has been held that, where one person is clerk and judge both, it is sufficient. *Cox v. Jones*, 52 Ga. 438. We have the right under section 4, chapter 13, Code, to take judicial notice of the law of another state, this being a change from the former law (1 Rob. Prac. 249; 1 Greenl. Ev. § 5, note 1; *Id.* § 489) and, in exercising this power, can consult the statutes of Ohio, or any other book, to learn that the probate judge is by law *ex officio* clerk of the probate court. *Goodrich's Case*, 14 W. Va. 840; *Manufacturing Co. v. Bennett*, 28 W. Va. 16.

It is claimed that certain deeds were improperly admitted. They were offered to show title in the plaintiff. They purport to be original deeds, not authenticated copies, and, being acknowledged in such manner as would allow them to be recorded here, that is sufficient under section 21, chapter 130, Code, 1891. But, even were the said will and deeds not admissible, it would be immaterial, as the plaintiff, so far as concerns his title to the premises, could maintain his action, as he was in actual possession, which is one and the first element of title, as it is *prima facie* evidence of full legal title in him who has it. 1 Lomax, Dig. 574; 2 Minor's Inst. 447; 2 Bl. Comm. 596 and note. One in actual possession may maintain *trespassquareclausumfregit*. Formerly, to maintain

that action, actual possession was necessary. Bart. Law Prac. 182; *Kretzer v. Wysong*, 6 Rand. (Va.) 8; and *Truss v. Old*, *Id.* 556. Therefore, a tenant being in possession, the landlord could not sue in trespass for lasting injury to the freehold, but must bring trespass on the case. 1 Tucker 191. But now a constructive possession is sufficient to maintain trespass. *Snider v. Myers*, 3 W. Va. 195; *Storrs v. Feick*, 24 W. Va. 606.

I suppose the injury to the plaintiff's property was so direct and immediate from the explosion as to warrant an action of trespass under the strict principles of the common-law; but that is irrelevant, as, the action here being trespass on the case, we need not consider the nice and finespun distinction as to direct and consequential injury, on which rested the choice between the two forms of action, resulting formerly in so many nonsuits, discussed in *Jordan v. Wyatt*, 4 Gratt. 151 and elsewhere, as the enactment found in section 8, chapter 103, Code, that "in any case in which an action of trespass will lie there may be maintained an action of trespass on the case," does away with it in this case.

Another error alleged in the petition for the writ of error is that the court allowed to go in evidence the answer of the Phoenix Powder Manufacturing Company filed in a suit of the Huntington & Kenova Land Development Company. The object of tendering this answer as evidence was, I suppose, to have the benefit of the statement in it as an admission that the defendant did buy land, and upon it erect and operate a powder manufactory. Was it admissible? It was a pleading in a case to which Wilson was a stranger. A judicial record is not admissible against or binding upon parties to it, in favor of strangers to it, its effect being confined to parties and their privies, that is, when offered to have the effect of estoppel, under the principle of *res judicata*; but that was not the purpose of the introduction here, it being offered only as an item of evidence is an admission by the defendant, open to explanation or rebuttal. There is a volume of law to show that pleadings in another cause may be used for evidentiary or collateral purposes where only one party to the case on trial was a

party to the former one. An answer in chancery may be used as evidence of an admission of a fact or facts. *Hunter v. Jones*, 6 Rand. (Va.) 541; *Tabb v. Cabell*, 17 Gratt. 160; 1 Greenl. Ev. § 572a; 1 Whart. Ev. §§ 836, 838. Moreover, without the admission contained in the answer, there was plenty of evidence to show that the defendants built and operated the mill, and stored powder there, especially on a demurrer to evidence. There was ample evidence to sustain the verdict, especially considered upon a demurrer to the evidence.

We can not set aside the verdict for excessiveness of damages. Therefore we affirm the judgment.

CHARLESTON.

BATES v. SWIGER *et al.*

Submitted January 28, 1895—Decided April 6, 1895.

1. SPECIFIC PERFORMANCE—INNOCENT PURCHASER.

Where a vendor by executory contract, has conveyed the legal title to a subsequent purchaser for value, without notice, there can not be specific performance of the executory contract in favor of the first purchaser; but, if the second purchaser had notice, there can be, the conveyance to him being void as to the first purchaser, and he can be compelled to convey the land, without warranty, to the first purchaser. Proper decree in such case.

2. SPECIFIC PERFORMANCE—OUTSTANDING INCUMBRANCE—GENERAL WARRANTY.

Where the land is subject to a life maintenance in favor of a third party, that is no impediment to a specific performance of a contract of sale with general warranty, if the purchaser will accept a conveyance with such warranty, and rely upon it for indemnity against such incumbrance.

3. CHARGE ON LAND.

A reservation or charge upon land, in a conveyance, for maintenance for life, is valid, though no amount be fixed.

4. ESTOPPEL IN *Pais*—CHARGE ON LAND.

One owning or having any interest in or charge upon land, knowing that another is about to purchase it, who declares to such other person, that he has no interest in the land, and that the one proposing to sell has the absolute right to the land, can not set up any ownership, interest, or charge, then existing, hostile to the right acquired by such purchaser.

40	420
41	785
40	420
42	462
49	510
40	420
450	93
50	110
40	420
52	607
52	641
40	420
56	265
40	420
59	263
60	698

5. ESTOPPEL IN *Pais*.

Where one, by words or conduct, intentionally causes another to believe in the existence of a certain state of things, or such words or conduct are of such nature as he has reason to believe will cause him to so believe, and such other, not knowing to the contrary, acts thereon, the former will be estopped from averring or claiming under a different state of things, then existing and known to him, to the prejudice of the other party.

6. SUBROGATION.

Subrogation, being merely the creature of equity, and not of contractual nature, will be administered only in harmony with its fixed rules, in furtherance of justice.

7. SUBROGATION.

Subrogation is not given to one who officiously, as a stranger, pays a debt of another.

8. SUBROGATION—FRAUD.

One guilty of fraud in the transaction in which he asks subrogation, as one who asks it must come before the court with clean hands, can not have subrogation. Therefore, a second purchaser, who, with notice of the right of a first purchaser, pays off a lien on the land, can not ask to be substituted to it.

M. R. CROUSE and Millard F. Snider for appellee, cited Jones Liens. § 1071; 8 Leigh 522; 30 W. Va. 687; 3 Pom. Eq. Jur. § 1252; 2 Jones Liens § 1116; Story Eq. Jur. §§ 384, 385, 390; Sug. Vendors (Ed. 1807) 480; 33 Ark. 468; Hennan Estop. § 776; 19 S. E. Rep. 539; 6 Johns. Chy. 166; 5 Johns. Chy. 184; 30 W. Va. 687; 26 Gratt. 549; 39 W. Va. 732; 10 W. Va. 677; 87 Va. 391; 2 Rob. (Old) Prac. 170; 2 Min. Inst. 871; 2 Story Eq. Jur. § 751; 13 W. Va. 388; 20 W. Va. 272, 279; 10 Leigh 179; 9 W. Va. 154; 1 P. & H. 277; 26 W. Va. 754; 27 W. Va. 229.

J. V. BLAIR for appellants.

BRANNON, JUDGE:

Charlotte A. Swiger, by executory contract, sold to Squire Bates a tract of land. The consideration was nine hundred dollars, of which he paid down twenty dollars, and was to pay one hundred and eighty dollars more in money to Charlotte A. Swiger, and pay off a deed of trust to McMillan, when the deed should be made to Bates, and the remainder was to be paid in three annual installments.

This land had been conveyed to Charlotte A. Swiger by her father and mother, William L. Swiger and Elizabeth Swiger, by a deed reserving to them "their lifetime maintenance in said land."

Some short time after the sale, Bates met Charlotte A. Swiger and her father and mother at their home, counted out the one hundred and eighty dollar balance of cash to be paid under the contract, tendered it, and asked for his deed, which was refused; and they said they would pay the twenty dollars back, and got it, and proposed to refund it to Bates. Bates declined to receive it, saying it was the land he wanted, and insisted upon the performance of the contract; and, as Charlotte A. Swiger would not receive the one hundred and eighty dollars, he left it on the table, in their presence, and left the house. He had in the meantime paid a small part of the McMillan deed of trust debt, and had received from McMillan a writing addressed to W. L. Swiger, who, with his wife, had made the deed of trust to secure a note made by them to McMillan saying that he (Bates) had arranged to settle and pay the debt amounting to one hundred and six dollars and eighty three cents, and that the deed of trust need not interfere with any trade between them. This writing was exhibited to the parties on the occasion when Bates offered the money and demanded a deed. Later on the parties met again, when a deed was offered to Bates, and he objected to it for two reasons—one, that its boundary included some land of a third party, and because of indefiniteness of description; the second, because it reserved "unto said Elizabeth Swiger and Wm. L. Swiger their life estate, support, and maintenance in and on said land," whereas the contract between Charlotte A. Swiger and Bates called for a general warranty, making no provision for such reservation of a life estate. The reason given for refusal to make an absolute conveyance was that such reservation existed in favor of her father and mother, and they would not join in the deed.

In a day or two afterwards Charlotte A. Swiger sold this same land to H. L. Swiger; and she and her father and mother joined in a deed conveying it to him for the consideration of

one thousand dollars, of which one hundred and seven dollars is recited as paid down, and the residue payable in deferred installments, reserving no life estate or maintenance.

Then Bates brought a suit in the Circuit Court of Doddridge county to specifically enforce the contract between him and Charlotte A. Swiger; to set aside the conveyance to H. L. Swiger, as made with notice on his part of Bates' purchase, and therefore fraudulent; and to declare that the life maintenance reserved in the conveyance to Charlotte A. Swiger in favor of William L. and Elizabeth Swiger was not valid, or longer valid, against Bates, because he (Bates) did not know of any such reservation in said deed, as he lived distant from the office in which it was recorded, and William L. Swiger and Elizabeth Swiger had represented and declared to him at the time when he entered into said contract that they had no interest in the land, but that Charlotte A. Swiger owned it all, absolutely, and that they had aided in and consented to her making the sale, and he relied on and believed those representations.

The court entered a decree that in its opinion, Charlotte A. Swiger could not make a deed in accordance with her contract, but that plaintiff was entitled to specific performance, so far as she was able to perform, and putting Bates to an election whether he would accept a conveyance of such title as she was able to make. At the next term the court entered a decree from which it appears that Bates refused to take only such deed as she could make, and elected to take a deed in fee, with covenant of general warranty, without any reservation or incumbrance, save a lien for unpaid purchase money; and the court thereupon went on to decree that the plaintiff have specific execution of the contract, and that William L. Swiger had forfeited and estopped himself from making any claim for life maintenance upon said land, but that Elizabeth Swiger had not done so, and reserving her life maintenance, without prejudice from the decree, and annulling, as fraudulent, the deed made by Charlotte A. Swiger, William L. Swiger and Elizabeth Swiger to H. L. Swiger, and that Charlotte A. Swiger execute to Bates a deed, with general warranty, for the land, without

reservation or incumbrance, save a lien for unpaid purchase money, and that Bates execute notes therefor, and pay McMillan his debt. Charlotte A., H. L., Elizabeth and William L. Swiger unite in an appeal from said decree. Squire Bates cross-assigns certain errors to his prejudice.

First, it is said, against the decree, that it is inconsistent with the first one. That is not material. A court ought to be allowed to change its mind before final decree. The first was a mere expression of opinion, but preparatory to a further decree; it decreed nothing. An interlocutory decree may be set aside before the final decree. *Morgan v. Railroad Co.*, 39 W. Va. 19 (19 S. E. Rep. 588). But this was no decree.

Now, take the case as to Charlotte A. Swiger. She made a plain contract entitling Bates to a clear conveyance, with general warranty; and the deed which she wished Bates to accept was not a compliance, because it reserved a life estate in favor of William L. and Elizabeth Swiger. Indeed, under the reservation in that deed, she created, as I think, a more serious and hurtful encumbrance to her vendee than that contained in the deed from her father and mother to her, as that gave them only maintenance, not a right to possession, whereas her deed to Bates called for a life estate in the land, calling for possession, but in any view an encumbrance detracting seriously and substantially from the value of Bates' estate in the land. The decree of specific execution, as against her (Charlotte A. Swiger) is one but as a matter of course under equity principles of specific performance, as expounded in *Abbott v. L'Hommedieu*, 10 W. Va. 677, unless there be impediment, either because of her conveyance to H. L. Swiger, or because there was a life maintenance charged on the land in favor of her father and mother, which bound her estate, and which might involve her in trouble from action for breach of warranty.

As to the impediment from her conveyance of the fee to H. L. Swiger: If he were a purchaser for value, without notice, no decree of specific performance could go against Charlotte A. Swiger, for she would have no land to convey, and would be utterly disabled from conveying, by reason of

the valid estate in H. L. Swiger; and the decree would be abortive, and the plaintiff could get relief only by an action for damages on the violated contract. Wat. Spec. Perf. § 125; Pom. Spec. Perf. §§ 294, 461, 462. But H. L. Swiger was not a complete purchaser, not having paid purchase money; and, moreover, it is plain and clear from the evidence that when he purchased he knew, as he admits, of the sale to Bates. He says he was informed that Bates had refused to accept a deed—the insufficient deed above referred to. He was bound to inquire of Bates as to his rights. Bates did nothing to mislead him. If he depended on misinformation, he assumed the risk and hazard. The truth is, his conduct is entirely reprehensible, as he wanted to buy the land himself, and sought the merest pretext for doing so, in violation of Bates' rights; and no one reading the evidence can hesitate to say that the finding upon it by the Circuit Court judge, that his purchase was fraudulent and void, is correct.

Next, did the existence of the life-maintenance charge on the land in favor of her father and mother forbid a decree against her compelling her into a general warranty, which might subject her to liability for its breach? Here an argument is made that this charge or reservation in the deed to Charlotte A. Swiger for life maintenance is too general, unliquidated and indefinite, and is therefore no charge, or void; and this contention is based on *Bracey v. Catron*, 8 Leigh. 522. But I do not concur in this contention. That case does say that an agreement between vendor and vendee that the vendee support vendor during life, and two daughters until they married, constituted no lien; but there was no reservation or charge in the deed, and it was in the days of implied lien, and, if any lien, it was an implied one. And Judge Tucker said the doctrine of secret, implied liens had been carried too far already, to the ruin of innocent purchasers, and that it ought not to be extended to a case where the amount of the charge was indefinite, extending through several lives, and would justify such liens in favor of several generations, so that purchasers could not know the amount, even if they knew of the fact of the charge. But here is an express charge, on the face of the deed, and, while indefinite

in amount, is ascertainable; and a purchaser could and would be bound to know of it, as it is in the chain of his title. A similar charge contained in a deed was supported in *Pocnal v. Taylor*, 10 Leigh 172. Still, though a valid charge, it was no bar to a decree of specific performance. It was not a total absence of estate in Charlotte Swiger, but only a charge for a small part of the duration of the fee—a partial disability—and might not ever be enforced. She, with knowledge of it, warranted against it, by her contract; and she can not declaim against a liability under her self-imposed warranty, if the purchaser is willing to take it. It may be, he could ask performance, with compensation by abatement from purchase-money; but certainly the vendor can not complain that Bates elects to accept, and rest on his warranty. Pom. Spec. Perf. § 438; Wat. Spec. Perf. §§ 130, 203. And this impediment was still further diminished by the denial of any right in William L. Swiger to claim anything for his maintenance. The decree would forever bar him.

As to H. L. Swiger: I have said enough touching his case above.

As to William L. Swiger: The evidence is abundant to justify the decree declaring that he had no further right to maintenance under the deed from his wife and himself to Charlotte A. Swiger. He induced Bates to make the contract with his daughter. He was present at the drafting of the contract (she being absent) participated in it, fixed terms, and when it was proposed to draw it in his name, as the seller, the other party and the scrivener supposing he owned the land, he said, "No;" that he had no interest in the land, but it was his daughter's—and went along with Bates' son to Bates', where she was working, young Bates taking the contract for his father, to have her sign it, and with the twenty dollars cash, and she signed it. In every way he showed his assent. He never mentioned his interest or maintenance, but let his neighbor go on and buy, and pay money—he silent as to his right. This silence alone estops him, as an estoppel in *pais*, called "equitable estoppel." 1 Bigelow Estop. 544. But he affirmatively and expressly de-

clared that he had no interest, but that his daughter was absolute owner. This, of course, would estop his claim. See doctrine of estoppel stated in *Mason v. Bridge Co.*, 28 W. Va., on page 649; *Stone v. Tyree*, 30 W. Va. 687 (5 S. E. Rep. 878) *Railroad Co. v. Perdue* (this term) 21 S. E. Rep. 755.

An estoppel in *pais* operates where a person has made an admission or done an act with intent to influence the conduct of another, or that he has reason to believe will influence his conduct, inconsistent with the evidence he proposes now, or with the claim or title he proposes to set up, where the other party has been influenced by and has acted upon it, and where he would be prejudiced by the allowance of the claim or title set up. Pom. Eq. Jur. § 804; *Cowles v. Bacon*, 56 Am. Dec. 371; *Drex v. Kimball*, 80 Am. Dec. 163; *Iron Co. v. Trout*, 83 Va. 397 (2 S. E. Rep. 713).

William L. Swiger could not even stand by, silent as to his interest in the land, and see this contract made, and money paid under it to his daughter, and know that money would be paid to McMillan, and indeed take the active agency for his daughter in the sale, and then set up his claim. Where one has the legal title to land, acquiesces in its sale by a person under claim of title and moreover advises and encourages the parties to carry out such sale, he will be estopped from asserting his title against the purchaser. *Bigelow*, Estop. 544; Pom. Eq. Jur. § 818; *Maple v. Kussart*, 91 Am. Dec. 214; *Titus v. Morse*, 63 Am. Dec. 665; *Stebbins v. Bruce*, 80 Va. 389.

In *Stone v. Tyree*, 30 W. Va. 687 (5 S. E. Rep. 878) it is held that one who has title to land, and stands silent by, and allows an innocent man to purchase from one claiming authority to sell, is estopped from claiming the land against the purchaser, on the ground that the seller had no authority; and so far did the case carry this doctrine that it held that a court of equity would compel him to convey to the innocent purchaser. ;

It can not be said that Bates ought to have examined the record to see if the title was clear, and not have relied on Swiger's declaration or silence; but, in view of those declarations—even silence alone—he need not go to the record.

The declarations misled, and dispensed with inquiry; and mere silence, under the circumstances, will estop W. L. Swiger, regardless of any record examination. *Stone v. Tyree*, 30 W. Va. 704 (5 S. E. Rep. 878).

As to Elizabeth Swiger: The evidence of any conduct on her part to bar her further claim to life maintenance is not nearly so strong as that against her husband. She was not present at the execution of the contract, and did not, prior to its close, make declarations that she had no interest, and that her daughter had the absolute estate. She was not present, and silent, prior to the contract, when she should speak, unless we say it was at her house, after the contract was drawn up, and in the hands of Bates' son, to take it up to Charlotte to have it signed. She then and elsewhere expressed assent to the sale, but there is conflict of evidence as to what she there said between her and her husband and young Bates.

Mere declarations of satisfaction with the sale afterwards will not create this estoppel. Besides, several Virginia cases hold that participation of a wife in the fraud of the husband will not impair her rights. *Taylor v. Moore*, 2 Rand. (Va.) 563; *Penn v. Whitehead*, 17 Gratt., on page 512.

William L. and Elizabeth Swiger say they never intended to let Bates have their rights. They did at the time, but changed their minds to get a better price. They estimated their life maintenance at much more than one hundred dollars, and, if they did not intend to let Bates have the land unincumbered, it is strange that in a day or so they sold their interest, with the fee, for only one hundred dollars more, to a nephew, unless it was a shift to keep Bates from having the land, and retain it for themselves. But, to debar her, we must find conduct before the sale, in its negotiation, on her part, misleading, or ignoring her right, so as to make an equitable estoppel against her; and we can not sustain the appellee's cross-assignment, and reverse the Circuit judge on a question of fact, on the evidence.

Then it is argued that as Elizabeth Swiger's interest was left still in her, the deed from her and others to H. L. Swiger passed that interest and ought not to have been wholly set

aside. Of course, as it conveyed, with general warranty, the land, she would be hindered from claiming maintenance had the deed stood, and it would be merged; but it did not pass the maintenance separately, as that is a merely personal right of hers. I do not think there is fault in the decree in wholly annulling the deed, as there would be under such cases as *Love v. Tinsley*, 32 W. Va. 25 (9 S. E. Rep. 44) in case of deeds fraudulent as to creditors, as in them, if the debt be paid, the vendee retains the land, as it was only subject to the incumbrance of debt; but, in case of conveyance to a purchaser with notice, the very title to the land must be passed to the first purchaser. My opinion is that in such a case as this—a suit to enforce performance of an executory contract, where the vendor has passed title to a second purchaser, with notice—the proper decree is to direct a conveyance by the vendor with such warranty as he stipulated, and from the second purchaser without warranty, in one or separate deeds. As the legal title passed, a conveyance from the second purchaser would be sufficient to give the first one such title; but you want the warranty of the first, and the estoppel created by it. Thus you follow up the legal title, certainly divesting the second purchaser of it, and vesting it in the first, and avoiding all questions as to the whereabouts of the legal title in case of a decree directing a deed from the seller, and annulling the second deed as to the first purchaser. Where the second deed is wholly avoided, as in this case, it reverts the title in its grantor; and likely so, too, in the case of such partial annulment, when taken in connection with record. The decree will be modified so as not to prejudice any rights that may exist between the grantors and grantee in that deed.

A point made against the decree is that it requires Bates to pay McMillan his debt, whereas H. L. Swiger had already paid it, and Bates ought to have been required to pay it to H. L. Swiger. Though it was not an officious payment, as to Swiger's grantors, yet it was such as to Bates, and is no ground of action against him. *Crumlish's Adm'r v. Improvement Co.*, 38 W. Va. 390 (18 S. E. Rep. 456). A stranger can not be subrogated to a lien. *McNeil v. Miller*, 29 W. Va. 480 (2 S. E. Rep. 335).

But a still more serious bar lies in the way of H. L. Swiger to subrogation to the McMillan lien. Subrogation is purely the creature of a court of equity, is not a matter of contractual character, and is administered just as equity deems proper, consistently with its principles, to further justice. One who asks relief, by way of subrogation or otherwise, in a court of equity, must, under one of its most fixed rules, come with clean hands, guilty of no fraud. But H. L. Swiger with eyes open to Bates' rights, sought to wrong him out of his prior right to the land; and this payment is one of the very acts done by him, in collusion with the other parties, to effectuate that purpose. His grantors wanted one hundred dollars more for the property than they had agreed to take. Moved by this design, probably at the instigation of some third party, they had recourse to this sale to H. L. Swiger. If not this, it was a mere covert, sham sale, to keep Bates from getting the land under his purchase, and there is some show of this; and, if so, it is worse for H. L. Swiger, making him only an instrument for the accomplishment of the wrong. In either aspect it was a wrong, odious to a court of equity. Justice Bradley said in *Railroad Co. v. Soutter*, 13 Wall., on page 523: "Was it ever known that a fraudulent purchaser of property, when deprived of its possession could recover for his repairs or improvements, or for incumbrances lifted by him? If such a case can be found in the books, we have not been referred to it. Whatever a man does to benefit an estate under such circumstances, he does in his own wrong. * * * One of the maxims of the latter system (English equity) is, 'He that hath committed iniquity shall not have equity.' Subrogation will not be applied to relieve a vendee from the consequences of his own wrongful act, or of a wrongful act in which he had participated, or of the wrongful act of one under whom he claims." *Sheld. Subr.* § 44.

The decree was one of the specific performance of the contract, and followed it in decreeing payment to McMillan by Bates. What remedy H. L. Swiger may have, it is not proper to say. If, as Lord Coke says, he has no remedy, it is the case of the woodcock caught in his own springe. The plaintiff, it is said, had not paid the McMillan debt. He had

arranged it and McMillan looked no longer to the debtors, but took Bates and the land. All this he did before he asked a deed. No objection was made on that score. Bates showed himself prompt and eager to execute the contract, and the defendant Charlotte A. Swiger, a young girl, who had derived title from her parents, to frustrate the enforcement of a liability feared by the father and mother, took every means suggested by her father, and probably by some one else, to defeat a plain and just right of Bates, whose conduct in the matter seems not open to any wrong or impropriety.

The decree is affirmed without prejudice to the rights of H. L. Swiger, as against Charlotte A. Swiger, William L. Swiger, or Elizabeth Swiger, growing out of their deed to him dated 1st day of November, 1892.

CHARLESTON.

BOARD OF EDUCATION OF OCEANA DIST. v. MITCHELL *et al.*

Submitted January 19, 1895—Decided April 6, 1895.

1. HUSBAND AND WIFE—MARRIED WOMAN—SEPARATE ESTATE.
Married woman's separate property. Points one, two, three, four, five and ten of the syllabus, in the case of *Trapnell v. Conklyn* (37 W. Va. 242) and point two of the syllabus in case of *Stewart v. Stout*, 38 W. Va. 478, approved.

2. HUSBAND AND WIFE—SEPARATE ESTATE—HUSBAND'S CREDITORS.

A court of equity will not at the instance of the husband's creditors attempt to charge a wife's separate property with alleged improvements put thereon by the skill and labor of the husband, unless the evidence establishes the existence, and at least the approximate amount, of such improvements.

WATTS & ASHBY for appellant.

DENT, JUDGE:

Virginia D. Mitchell appeals from a decree of the Circuit Court of Wyoming county, rendered on the 17th day of July, 1890, in two consolidated chancery suits pending therein, in

favor of certain judgment creditors to enforce their liens against the real estate of R. Mitchell, the husband of the appellant. An amended bill, to which appellant was made defendant, brought into these suits two certain small tracts of land, one containing one acre, the other two hundred and seventy three poles, the legal title of which was in the defendant, and alleged that said tracts were purchased and paid for by the husband and large improvements were put thereon, by him, and were conveyed at his instance, in order to delay, hinder and defraud his creditors, to the appellant.

Appellant filed her answer, denying the allegations and claiming that said lands and the improvements were paid for and made by her out of her separate estate.

The commissioner to whom the causes were referred reported that the one acre-tract was purchased and paid for by her with funds not furnished by her husband, but that the two hundred and seventy three pole-tract and the improvements to the amount of one thousand four hundred dollars on the other tract were in fraud of the husband's creditors. Appellant excepted to this report, but the court overruled the exception and decreed accordingly.

The evidence for appellant shows that she bought the one acre-tract, and paid for it with money earned by her in teaching school before marriage. The consideration was only thirty dollars. She also testifies, and is sustained by her husband and her vendor, that she purchased the two hundred and seventy three pole-tract for sixty dollars, part of which she paid out of the proceeds of a cow, which was her separate property, and partly out of goods purchased on credit and sold by her, and that the vendor, Clay, had her note for the balance, which was unpaid.

Mr. Henry J. Clay, who sold the two tracts of land to appellant, had a stock of goods, and proposed to her, if she would build on the one acre-tract, he would pay for the same in goods, and move in and occupy the store room. The improvements cost about five hundred dollars, three hundred and twenty eight dollars of this amount was paid by Clay out of the store goods, and remains an open and unsettled account between said Clay and appellant; seventy four dol-

lars for lumber, was also paid out of the store; and eighty dollars for lumber, was paid with a horse which appellant purchased from her father-in-law, Joseph Mitchell, on credit, and which she was to pay for in such things as and when he needed them. A large part remains unpaid.

Apparently from the evidence, the appellant has been since the year 1888, carrying on a store business for herself. About all these matters she had the aid and assistance of her husband, who sometimes clerked for her without charge, and sometimes for H. J. Clay. He also did some inconsiderable work on the buildings, assisting and superintending the carpenters. But the extent and value of such work does not appear. Several witnesses on behalf of the plaintiff gave their opinion that the improvements on the property were worth from one thousand two hundred dollars to one thousand five hundred dollars. These witnesses give a mere estimate founded on the appearance of the property, with little or no expert knowledge. They furnish no basis on which to found a solid judgment, contradicted as they clearly are by the actual cost of the improvements. One witness testifies that some time after the improvements were put on the property, Mr. Mitchell told him that the improvements had cost him one thousand four hundred dollars, besides his own work. It is not pretended that this declaration was made in the presence of the appellant, and it would be an exceedingly harsh rule to permit a wife's separate property to be taken away from her by reason of sweeping declarations made by her husband in her absence, even admitting such declarations to be unquestioned. As a case in point, see *Trapnell v. Conklyn*, 37 W. Va. 242 (16 S. E. Rep. 570) where it is held that the declarations of the husband are not admissible against the wife in a contest between the wife and his creditors; that the general rule of evidence is applicable in such cases, *Casto v. Fry*, 33 W. Va. 449 (10 S. E. Rep. 799).

Husbands are so accustomed to their old and senile common-law prerogatives, which are slowly yielding to the nobler and more righteous enactments, that, as barons not quite shorn of their strength, they still talk egotistically of

their *femes'* separate estates. They, in ordinary conversation, with a selfishness born of pride, cling to the exploded theory that whatever is my wife's is mine alone, for she is, and yet is not, for I am. We are two in one, and I am the one, even though she supports me.

"'Man, poor man,' said the pitying spirit,
'Dearly *you* pay for your primal fall.
Some flow'rets of Eden *you* still inherit,
But the trall of the serpent is over them all.'"

This appears to be a case wherein a woman who had earned a small amount of money teaching school marries a man who is notoriously insolvent, and undertakes with her frugal savings to buy a small tract of land, improve it by its use, her credit and services in selling goods, and in such other ways as are open to her, and then because her husband has given her to some extent the benefit of his time and labor, and is entitled to her earnings, his creditors must come in and swallow up the whole. In short, in marrying an insolvent man she has hopelessly mortgaged herself to his creditors, and her small accumulations must be surrendered to the satisfaction of his debts. His misfortunes attach to her with remorseless grasp, under the unbending rules of the common-law.

In the case of *Bailey v. Gardner*, 31 W. Va. 94 (5 S. E. Rep. 636) this Court held that a wife's earnings are the separate property of her husband. This law is now abrogated by legislative enactment. Acts 1893, c. 3, s. 12. But it was in full force at the time of the institution of the present suits. It is the settled law that improvements put upon a wife's separate property by her husband can be subjected to the payment of the latter's debts. *Bank v. Wilson*, 25 W. Va. 244; *Rose v. Brown*, 11 W. Va. 122. As an exception to both these rules it has been held that when her skill and labor in the use of her separate property produce profits, they are hers, not earnings belonging to her husband. *Stewart v. Stout*, 38 W. Va. 478 (18 S. E. Rep. 726); *Trapnell v. Conklyn*, 37 W. Va. 248 (16 S. E. Rep. 570). Also, that a husband may give his attention and labor to the care and improvement of his wife's separate property without making the same liable for the payment of his debts. *Robinson v. Neill*, 34 W. Va.

128 (11 S. E. Rep. 999); *Stewart v. Stout*, and *Trapnell v. Conklyn*, *supra*; *Atwood v. Dolan*, 34 W. Va. 563 (12 S. E. Rep. 688).

The appellant in the present case purchased this property with her separate funds and credit, improved it on credit, and proceeded to pay for the improvements by the use of the property as a storeroom in which to sell goods. While paying for it in this manner, and before it was paid for, these suits were brought against it. This case is especially in point with *Trapnell v. Conklyn*, *supra*, as followed by *Stewart v. Stout*, *supra*. As to any services rendered or labor performed by the husband, it is governed by the case of *Boggess v. Richards' Adm'r*, 39 W. Va. 567 (20 S. E. Rep. 599) where it is held that from the husband's services and labor must be first deducted the support of himself, wife and family before his creditors can ask the benefit of profits thereby accumulated. But there is no evidence to show that there were any profits, or putting any value whatever on his services. Uncertain "guesses" as to the increased value of property furnish no basis on which the court can determine how much the services and labor of a husband may have been instrumental in producing such value, in the absence of any evidence showing or tending to show what such labor and services were worth, and, even if this were in evidence, there is nothing to show a clear profit subject to apportionment by a court of equity.

For the foregoing reasons the decree complained of is reversed as to the appellant, Virginia D. Mitchell, and said suits are dismissed in so far as she and her separate property involved therein are concerned.

CHARLESTON.

FLANNEGAN v. CHESAPEAKE & O. R'Y Co.

Submitted January 23, 1895—Decided April 6, 1895.

1. RAILROAD COMPANIES—FELLOW SERVANTS.

The first, second and third points of the syllabus, in the case of *Haney v. Railway Co.* 38 W. Va. 570, approved.

2. RAILROAD COMPANIES—FELLOW SERVANTS—TELEGRAPH OPERATOR.

The telegraph operator in charge of a signal station, who has control, by means of signal orders, of the running of trains over a block section of a railroad, is not the fellow servant of a brakeman injured on such block section by reason of such operator's negligent management of the running of such trains.

3. RAILROAD COMPANIES—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

The syllabus in the case of *Comer v. Mining Co.* 34 W. Va. 534, approved.

SIMMS & ENSLOW for plaintiff in error, cited McKinney on Fellow Servants, § 124, p. 267, 220, 311; 27 W. Va. 145; 28 W. Va. 610; Bish. Non-Cont. Law. Ch. 32, §§ 636, 665; 30 Minn. 31; 36 W. Va. 418; 18 Southwestern 748; 23 Wis. 668; 15 Lea (Tenn.) 145; 67 Barbour (N. Y.) 96; 87 N. C. 837; 37 W. Va. 502; 34 W. Va. 260.

T. G. MANN and W. R. THOMPSON for defendant in error, cited 38 W. Va. 370; 100 U. S. 213; 27 W. Va. 145; 11 W. Va. 14; 16 W. Va. 307; 25 W. Va. 570; Bishop Non-Cont. Law, § 665; 36 W. Va. 397; 28 W. Va. 610; 81 Va. 584.

DENT, JUDGE:

This is a writ of error from the judgment of the Circuit Court of Fayette county rendered on the 6th day of March, 1894, for the sum of five thousand and twelve dollars and seventy two cents, in favor of R. E. Flannegan against the

40	436
40	660
40	436
43	112
43	392
43	401
40	436
182	566

Chesapeake & Ohio Railroad Company, on a demurrer to evidence.

The facts are as follows: On the 17th day of March, 1892, while the plaintiff was in the employ of the defendant as a brakeman on a freight train, his train became uncoupled in Stretcher's Neck tunnel, and it became his duty to couple it; and, while engaged in the discharge thereof, a passenger train ran into the rear end of the train, and caused the plaintiff's right leg to be cut off near the ankle. The conductor sent the rear brakeman back to flag any approaching train, but whether he discharged this duty properly does not appear in evidence. The engineer says he did not see the flagman, but heard some one say there was a man in the tunnel. Who said this, it does not appear. But it does appear that he was on the wrong side of the engine, owing to the curvature of the road, to see the flagman, and also that he was blinded by the smoke so that he could not see a foot ahead of the engine. The fireman's evidence was not taken, and it must have been he who saw the man in the tunnel. The rear end of the freight train was about three hundred and fifty feet from the west end of the tunnel when struck, which occurred but a few minutes—an uncertain time—after it became uncoupled.

The trains were run through this tunnel by means of signals known as the "block system;" there being a telegraph station at either end of the tunnel, in charge of an operator, whose duty it was, by signals, to notify trains when to stop, and when and at what rate to proceed. The operator at the west end gave the passenger train the wrong signal—being that for a clear track—and allowed it to proceed at full speed, when she should have stopped it. Defendant demurred to the evidence, but the court overruled it, and entered judgment for the plaintiff. It is now here insisted that the court erred in its judgment, for the reasons, *first* that the operator was a fellow servant with the plaintiff; *second*, that the accident was caused by the failure to flag the passenger train, on the part of the rear brakeman of the freight.

In passing on the first objection the court is asked to review and overrule the case of *Haney v. Railway Co.*, 38 W. Va.

570 (18 S. E. Rep. 748) wherein this question has already been determined. The contention is that both the flagman and signal operator are called upon to perform precisely similar duties, the signal stations being simply an additional precaution provided to prevent accidents. The definition of "fellow servants," as defined and settled by recent decisions, is, those "who are so far working together as to be practically co-operating, and to have opportunity to control or influence the conduct of each other, and have no superiority, the one over another" (*Madden v. Railway Co.*, 28 W. Va. 619) while it is held that those who act in a superior position, and have the right to direct and control the conduct of others, are not fellow servants of such others, especially in discharge of superior duties. *Riley v. Railway Co.*, 27 W. Va. 146; *Core v. Railroad Co.*, 38 W. Va. 456 (18 S. E. Rep. 596).

The rear brakeman or flagman on a train is the fellow servant of the front brakeman, for each has his respective, separate, yet dependent duties to perform in the running of the train; and they may influence, and even control each other's conduct, yet they are neither superior to, nor can they control, each other. Yet the flagman occupies a far different relation towards the trainmen of all other trains, for, in giving them warning of the obstruction of the track by the train to which he belongs, he performs a duty delegated to him by the master; and for his failure to discharge it the master is liable, for it is one of the master's personal non-assignable duties to keep the track free from obstructions, for the safety of his employes. So a flagman, in discharging the same duty, acts as a fellow servant to some, and as a superior or master to others, of his co-employes. Two persons who are called upon to perform the same duty, in effect, may occupy a relatively different position to the same employe, in its discharge. For instance, the flagman protects his co-employes by warning the approaching train, while the master, the dispatcher, and the operator render them the same protection by not allowing the train to use the track until it is clear. One stops the train. The other holds it back. The one is a part of the train, while the other belongs to an entirely different department, which has the supervision and

management of all trains, and yet is no part of any train, but is entirely stationary. The one acts for self-protection. The other, being in no personal danger, acts for the safety of others, and the dispatch of his master's business.

In this case the defendant, seeking to discharge its personal duty and provide a safe track, and at the same time facilitate the rapid movement of trains, established the signal station, and placed the operator in charge, with full authority by means of a code of signal orders equally as effective as any other kind could possibly be, to control the running of all trains over this block; and all trainmen, of every train, were under absolute rule to watch for and obey her orders before they dare enter upon the block. If she had been attentive to her duties, she must have known the block was occupied and obstructed, and her knowledge was the knowledge of the master; yet, in the face of that fact, she negligently gives a peremptory signal for the train to proceed. In what way could she possibly be the fellow servant of the trainmen, who are entirely at her command and who can neither influence or control her independent actions? She is as much the master of her section block as the master is of the whole road. In *Lewis v. Seifert*, 116 Pa. St. 647 (11 Atl. 514) it is held: "The master owes to every employe the duty of providing a reasonably safe place in which to work. This is a direct, personal and absolute obligation; and while the master may delegate these duties to an agent, such agent stands in the place of the principal, and the latter is responsible for the acts of the agent. And where the master or superior places the entire charge of his business, or a distinct branch of it, in the hands of an agent, or subordinate, exercising no discretion or oversight of his own, the master is held liable for the negligence of such agent or subordinate." *Mullan v. Steamship Co.*, 78 Pa. St. 25; *Railroad Co. v. Bell*, 112 Pa. St. 400 (4 Atl. 50). "It would be a monstrous doctrine to hold that a railroad company could frame such schedules as would inevitably, or even probably, result in collisions and loss of life. This is a personal, positive duty; and, while a corporation is compelled to act through agents, yet the agents, in performing duties of this character, stand in the

place of, and represent the principal. In other words they are vice principals." *Lewis v. Seifert*, 116 Pa. St. 647 (11 Atl. 514). In the case of *Railway Co. v. Salmon*, it is said: "Higher officers, agents or servants can not, with any degree of propriety, be termed fellow servants with the other employes, who do not possess any such extensive powers, and who have no choice but to obey such superior officers or servants. Such higher officers, agents or servants must be deemed in all cases, when they act within the scope of their authority, to act for their principal, in the place of their principal, and in fact to be the principal." 14 Kan. 524; *Darrigan v. Railroad Co.*, 52 Conn. 285. A volume might be written on this subject, and numerous authorities cited for and against the rule of vice principal, as propounded in the case of *Haney v. Railway Co.*, *supra*; but such rule has become too firmly established in this state to be departed from now, and must be carried out to its legitimate results, until abrogated or altered by legislation. It undoubtedly bears severely on corporations, but its object is the safety and preservation of life and limb.

The doctrine as recognized and enforced in this state, is that it is the personal and non-assignable duty of the master, *first*, to exercise reasonable care in providing and keeping in repair suitable machinery, and all necessary appliances, including a safe place to labor; *second*, to exercise a like care to provide and retain suitable servants for each department of service; *third*, to establish, conform to, and enforce compliance with, proper rules and regulations. These are the superior duties, for the proper performance of which the master is responsible, whether he intrust them to a department, or any employe, of any grade, and the neglect of which by the agent or agency to which they are intrusted renders the master liable to any one injured by reason of such neglect, against whom and to whom contributory negligence can not be shown or imputed, from his own act or the act of a fellow servant, whether it be of commission or omission. *Daniel's Adm'r v. Railway Co.*, 36 W. Va. 397 (15 S. E. Rep. 162); *Cooper v. Railway Co.*, 24 W. Va. 37; and other cases heretofore cited; also, *Schroeder v. Railway Co.*, 108 Mo. 323

(18 S. W. Rep. 1094); *Foster v. Railway Co.*, 115 Mo. 165 (21 S. W. Rep. 916). The decisions of many jurisdictions are not in line with our decisions on this subject. 7 Am. & Eng. Law 821 (tit. "Fellow Servants"). The rule of *stare decisis* applies with impregnable force in this instance, and from which there is no way of escape, even if the court were so inclined, unless by an utter and reprehensible disregard of all precedent.

Defendant insists, even if this be true, that the plaintiff is not entitled to recover, for the reason that his fellow servant, the flagman, failed to do his duty, and that therefore, contributory negligence is imputable to the plaintiff. The question at once presents itself as to the burden of proving neglect or non-neglect of duty on the part of the flagman. In the case of *Comer v. Mining Co.*, 34 W. Va. 534 (12 S. E. Rep. 476) Judge Brannon propounds the law, as settled by repeated decisions of this Court, as follows, to wit: "After the plaintiff has met this requirement by showing negligence of the defendant causing him injury, and not until then, the plaintiff may rest until the defendant answer it. The defendant may meet a case satisfactorily proven on the part of the plaintiff by showing contributory negligence on the part of the plaintiff as the proximate cause of the injury, but the burden of showing contributory negligence rests on the defendant." If the plaintiff's evidence shows contributory negligence, this is proof sufficient to defeat a recovery. *Riley v. Railway Co.*, 27 W. Va. 146; *Sheff v. City of Huntington*, 16 W. Va. 316; *Hesser v. Town of Grafton*, 33 W. Va. 548 (11 S. E. Rep. 211). Wherefore, we are required to determine whether the evidence justifies the inference of contributory negligence. If it is a matter of doubt, it must be resolved in favor of the demurree. The conductor of the freight testifies that he directed the rear brakeman to flag. The engineer of the passenger train says he saw no flagman, but some one informed him there was a man in the end of the tunnel. Owing to the curvature of the track, and the dense smoke, the engineer was not in position to see the flagman; and having been notified that the block was clear, by the signal given, he was not on the lookout, and had on

a full head of steam, and was running rapidly. The evidence of the fireman, who, if not busy in the performance of other duties, could have seen the flagman, is not taken, and neither is the evidence of the flagman. The time elapsed between the uncoupling of the train and the collision is very uncertain. The defendant could have made these questions certain, either for or against itself, by the evidence of the fireman and flagman; and the presumption arises that the evidence, if introduced, would have been adverse to the defendant, or it would not have been withheld. *Trust Co. v. McClellan*, 40 W. Va. 405 (21 S. E. Rep. 1025). On the demurrer to the evidence, the negligence of the defendant having been fully established, and the question of contributory negligence being left in an uncertain and doubtful condition, the plaintiff must prevail, as there is no obligation on him to prove that neither himself nor any of his co-servants were guilty of any fault or omission which might have been the proximate cause of the injury. The court can not infer such default from the absence of any, or a doubtful state of evidence relating thereto. *Comer v. Mining Co.*, *supra*. Where there is a grave doubt which of two inferences should be deduced, the court will adopt the one most favorable to the plaintiff, as the demurree. *Franklin v. Geho*, 30 W. Va. 27 (3 S. E. Rep. 168); *Schwarzbach v. Union*, 25 W. Va. 642; *Miller v. Insurance Co.*, 8 W. Va. 515; *Ware v. Stephenson*, 10 Leigh 164.

The Circuit Court having correctly determined the demurrer to evidence in favor of the plaintiff, the judgment is affirmed.

CHARLESTON.

NORFOLK & W. R. Co. v. PERDUE.

Submitted January, 19 1895—Decided April 6, 1895.

1. ESTOPPEL IN *Pais*—INJUNCTION.

Where a party who claims to be the owner of a tract of land has notice of the fact that a railroad company is excavating a

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40 427

40 442
43 573

40 442
48 279

40 442
450 93
50 110

40 442
52 643
52 646

tunnel through a mountain located on said land, under claim of title thereto, remains silent as to his ownership of the land, with full knowledge of his rights, and assists in the construction of said tunnel from its commencement until its completion, and the railroad is constructed through the same, without asserting any claim to the land through which the tunnel passes, and then institutes an action for damages against the railroad company for taking his land, he will be estopped from recovering in said action, and may be enjoined from further prosecuting such action for damages.

40	442
56	341
40	442
56	251
56	253
40	442
62	612

2. **ESTOPPEL IN *Pais*—EQUITABLE ESTOPPEL—EQUITY JURISDICTION.**

Such equitable estoppel may be asserted in a court of equity.

3. **ESTOPPEL IN *Pais*—EQUITABLE ESTOPPEL.**

When one of two innocent persons—that is, persons each guiltless of an intentional moral wrong—must suffer a loss, it must be borne by that one of them who by his conduct, acts, or omissions has rendered the injury possible.

4. **ESTOPPEL IN *Pais*—FRAUD.**

A party who by his acts, declarations, or admissions, or by failure to act or speak under circumstances when he should do so, either designedly or with willful disregard of the interests of others, induces or misleads another to conduct or dealings which he would not have entered upon but for this misleading influence, will not be allowed afterwards to come in and assert his right to the detriment of the person so misled. That would be a fraud.

A. W. REYNOLDS and JOHNSTON & HALE for appellant, cited 23 W. Va. 675; 26 W. Va. 839; 34 W. Va. 207; 32 W. Va. 286; 11 W. Va. 386; 25 W. Va. 99; Pom. Eq. Jur. (2d Ed.) § 182; 30 W. Va. 687; 12 Ken. Law 107; 67 Me. 196; 27 Atl. Rep. 965; 102 U. S. 79; 96 U. S. 743; 59 Pa. 214; 7 Watts (Pa.) 163; 7 Serg. & R. 395; 10 Serg. & R. 144; 6 Johns. Ch. 166; 1 Johns. Ch. 344; 54 Pa. 361; 4 Giff. Rep. 519; 42 Pa. 513; 54 N. W. Rep. 889; 17 S. W. Rep. 589; 18 S. W. Rep. 901, 1,117; 91 Pa. 281; 4 Halstead Ch. Reps. 84; 2 Del. Ch. 130; 25 Pac. Rep. 378; 10 Md. 301; 11 Humphrey 433; 62 Miss. 209; 18 B. Mon. 175; 33 Mich. 121; 73 N. C. 8; 38 N. C. 13.

OKEY JOHNSON, G. J. HOLBROOK and A. C. DAVIDSON for appellee, cited 17 How. 47; 2 Black (U. S.) 430; 1 Mod. Eq. Pr. § 136; 2 Id. § 765; 1 Bart. Law Pr. 182; 3 W. Va. 195; 24 W. Va. 606; 16 W. Va. 282; 1 Bart. Ch. Pr. 253 and cases cited; High on Inj. § 61; 2 Johns. Ch. 281; High on Inj. § 64;

67 N. Y. 23; 56 N. Y. 115; 38 Ga. 644; High on Inj. § 21; 51 Am. Dec. 601; 61 Am. Dec. 751; 90 Am. Dec. 378; 91 Am. Dec. 177; 99 Am. Dec. 365; 29 W. Va. 333; 12 Wall. 47; 19 W. Va. 439.

ENGLISH, JUDGE:

On the 2d day of December, 1892, the Norfolk & Western Railway Company presented to the Circuit Court of Mercer county in open court its bill praying for an injunction to restrain the defendant, George W. Perdue, from prosecuting certain actions of law mentioned in said bill, and from instituting any future actions against the plaintiff on account of the matters set up in said bill, which injunction was awarded.

The material facts alleged and relied upon by the plaintiff in said bill are: That it was a consolidated corporation doing business in said county of Mercer pursuant to the laws of the state of West Virginia, and was the owner and operator of a certain railroad which runs through said county, part of which runs through a tunnel known as "Flat Top Tunnel." That on the 7th day of January, 1887, it entered into a contract in writing with the Flat Top Coal Company by which the latter agreed and bound itself to convey to plaintiff a strip of land two hundred and twenty feet in width, and extending the entire length of said tunnel, one half thereof to be on each side of the center line of said railroad or tunnel; the object in acquiring said strip being to construct a tunnel through which to locate its railroad, which was well known to both parties to the contract. That at the time said contract was entered into the land in controversy belonged in fee simple to the Bluestone Coal Company, and that on the 12th day of April, 1889, the said Blue Stone Coal Company conveyed, by deed of that date, to the plaintiff, the said strip of land through which the said tunnel now runs, and that on the 25th day of February, 1890, E. W. Clark and others, trustees, who were grantees of the said Blue Stone Coal Company, again conveyed the said strip or parcel of land to the plaintiff; and in this manner the plaintiff became the owner in fee simple of said strip of land. That soon after obtaining the contract aforesaid, by

which it acquired said strip of land, it began the construction of its tunnel through the said strip of land, and prosecuted the said work, at a cost of many thousand dollars, until it was completed, early in the year 1888, and constructed therein its railroad, over which it began running its trains in the early part of the year 1888. That part of the excavation of said tunnel was through a vein of bituminous coal, which was taken out by plaintiff, but the cost of the said tunnel was many thousands of dollars more than the value of the coal taken out of same. That on the 21st day of February, 1890, the defendant, George W. Perdue, instituted in the Circuit Court of Mercer county, West Virginia, against the plaintiff, an action of trespass on the case, in which he set up claim to thirty four and thirty five one-hundredths acres through which the said tunnel is located and constructed, claiming ten thousand dollars damages on account of injury to the said tract of land claimed by him as aforesaid, and for excavating and removing the coal from the same in the construction of the said tunnel, which action is still pending and undetermined in said court, the papers in which cause are exhibited. That on the 25th day of March, 1891, the defendant, George W. Perdue, instituted another action of trespass on the case against the plaintiff, in which he claims one thousand dollars damages on account of the construction of the tunnel through the said thirty four and thirty five one-hundredths acres of land, and the construction and operation of the said railroad therein, which action is still pending and undetermined, and the record in which action is also exhibited with plaintiff's bill. That said George W. Perdue is prosecuting the said actions, and declares his intention to prosecute them to a final judgment. That the plaintiff is informed and believes that the said Perdue will bring other actions, and continue to harass the plaintiff with repeated actions, on account of his pretended claim to said thirty four and thirty five one-hundredths acres of land, and in regard to the same subject-matter involved in the first aforesaid action, unless he is restrained from so doing by a court of equity. That plaintiff is involved in a multiplicity of suits, and will con-

tinue to be harassed with a multiplicity of suits, on account of the pretended claim of the said thirty four and thirty five one-hundredths acres, which embraces part of the said tunnel, unless the title of the plaintiff to its said strip of land is quieted by a court of equity, and the said Perdue restrained from setting up further claim to it. That the claim of said Perdue to that part of said thirty four and thirty five one-hundredths acres of land which covers part of its said strip of two hundred and twenty feet through which the said tunnel is located is a cloud on the title of the plaintiff. That the said Perdue does not own the said land, or any part of the strip of land, belonging to the plaintiff as aforesaid, and that the claim of said Perdue should in equity be set aside as a cloud upon the title of the plaintiff. That the said Perdue knew when the plaintiff acquired title to the said land, and soon after the plaintiff began the work of constructing the said tunnel, and taking out the said coal, the said Perdue began work for the contractors who were carrying on the said work for plaintiff, and aided them in the construction of the said tunnel, and continued to aid in the construction of the same, for wages to be paid to him by said contractors, until the completion of the said tunnel. That notwithstanding the full and complete knowledge of the said Perdue of the claim of the plaintiff to said land, of the immense amount of money it was spending in the construction of the said tunnel and the railroad therein, he stood by and saw the work proceed till its completion and made no objection whatever to it, and gave to the plaintiff no notice whatever of his claim to the said land, and that the said George W. Perdue is estopped from setting up claim to any part of said strip of land belonging to plaintiff as aforesaid. That the conduct of said Perdue in keeping silent under the circumstances was a fraud upon the plaintiff, which will estop him from setting up claim to any part of the land of the plaintiff. That plaintiff had no notice whatever of the said Perdue's claim to the land purchased by it as aforesaid through which the said tunnel is located, or any part thereof, until after the completion of the said tunnel and railroad therein; its first notice of said claim

being but a short time before the institution of said first action by said Perdue against plaintiff. That plaintiff has been in the complete and full possession of its said land, and every part thereof, continuously ever since the beginning of the construction of the said tunnel, is now in the possession of the same, and entered into the possession thereof peaceably, quietly, with the full knowledge of the said Perdue, and without any objection by him. That said George W. Perdue asserts his claim to said land under a deed from one Zachariah Perdue; that said deed is a cloud on plaintiff's title; that it is invalid, so far as conveying title is concerned, and that it should be set aside as a cloud on plaintiff's title.

An injunction was prayed for enjoining and restraining said George W. Perdue from prosecuting said actions at law, and from instituting future actions against the plaintiff on account of the matters set forth in said bill, and it was prayed that the said deed under which said Perdue claims title, and the entire claim of title, of the said Perdue to any part of the plaintiff's land, might be set aside as a cloud upon the plaintiff's title, and that the plaintiff be quieted in its title and possession of its said land and railroad.

An injunction was awarded restraining said Perdue from prosecuting the actions at law then pending against the plaintiff, and from instituting and prosecuting other actions against the plaintiff with respect to the land and subject-matter and things set up in the bill. The defendant, George W. Perdue, demurred to the plaintiff's bill, and on the 2d day of March, 1894, the court sustained said demurrer, and dissolved said injunction, and the plaintiff, declining to amend its bill, applied for and obtained this appeal.

The first error assigned and relied upon by the appellant is that the Circuit Court erred in sustaining the demurrer to the plaintiff's bill, upon the ground that the bill presented a strong case for the relief of a court of equity, by decreeing in favor of the plaintiff an equitable estoppel against the said Perdue, which was fully, clearly, and distinctly alleged, together with all the facts constituting the said equit-

able estoppel in said bill, by decree removing the cloud from the title of appellant cast upon it by said Perdue's claim, the facts in relation to which were fully and distinctly alleged in the bill, and by decree perpetually enjoining the prosecutions of the said actions at law, which were shown by the facts alleged in the bill to be purely vexatious, *etc.*

Now, upon demurrer, the universally recognized rule is that all allegations of the bill which are well pleaded must be taken as conceded to be true, and the defendant by his demurrer asserts that admitting the allegations of the bill to be true, the plaintiff by his bill has not shown himself to be entitled to relief in a court of equity. Applying, then, this test to the bill filed in the case under consideration, let us examine the question of equitable estoppel, which is presented in the plaintiff's bill in the following language: "Plaintiff alleges that said George W. Perdue is estopped from setting up claim to any part of the said strip of two hundred and twenty feet in width of land belonging to this plaintiff as aforesaid. The said Perdue knew when this plaintiff acquired title to the said land in the manner hereinbefore stated, and soon after this plaintiff began the work of constructing the said tunnel, and taking out the said coal, the said Perdue began to work for the contractors who were carrying on the said work for this plaintiff, and aided them in the construction of the said tunnel, and continued to aid in the construction of the same, for wages to be paid to him by said contractors, until the completion of the said tunnel. Notwithstanding the full and complete knowledge of the said Perdue of the claim of the plaintiffs to said land, of the immense amount of money they were spending in the construction of the said tunnel and the railroad therein, he stood by and saw the work proceed till its completion, and made no objection whatever of his claim to the said land." "Plaintiff had no notice whatever of the said Perdue's claim to the land purchased by it as aforesaid through which the said tunnel is located, or any part thereof, until after the completion of the said tunnel and railroad therein." Regarding these allegations as conceded to be true on demurrer, and turning to the law bearing upon the question.

we find that a similar question was presented for the consideration of this Court in the case of *Stone v. Tyree*, 30 W. Va. 687 (5 S. E. Rep. 878) in which case Green, Judge, delivering the opinion of the Court, said: "It is recognized as law that if the owner of real estate, whether he has the legal title in him or not, permits such real estate to be sold in his presence by another, who claims to be the owner of the land, or by one who claims that he has full authority and power to dispose of the same, it is the duty of the true owner of the land to assert his claim then. And if he stands by and permits an innocent purchaser to buy such land from such person claiming to have full power to dispose of it, he will be estopped thereafter from setting up a claim to such land, because of a want of full power and authority on the part of the person selling it to make good title thereto, as against such innocent purchaser, by his acquiescence at the time in the legality of such sale made in his presence." He also says: "Whenever, in this or any other manner, such owner of lands misleads another, by his conduct or words, into the belief that a third person owns certain land, or possesses full power or authority to sell it, and he knows that such conduct or words would naturally have this effect, whether he intended them to defraud such purchaser or not, he will not only be estopped from claiming, against such innocent purchaser, this land, because in fact the person so selling it as his own, or having full power and authority to sell it, either did not own it or had no authority to sell it such as he claimed, but the courts of equity go further, and would under such circumstances compel him to convey such land to such innocent purchaser." Now, the facts being conceded as stated in the bill, it is easily perceived what gross injury and injustice would result to the appellant from the conduct of the appellee, if the doctrine of estoppel was not applied.

It appears from the allegations of the bill that the appellee, George W. Perdue, was cognizant of the fact that this strip of land two hundred and twenty feet wide was acquired by the appellant for the purpose of constructing a tunnel through the Flat Top Mountain and using it as a thorough-

fare for its railroad. Not only so, but that he actually aided in the construction of said tunnel, as a laborer, from a period soon after its commencement until its completion, being fully cognizant of the claims of appellant and of the immense amount of money it was expending in the construction of the same. A question somewhat similar to the one submitted by this record was before the Supreme Court of the United States in the case of *Morgan v. Railroad Co.*, 96 U. S. 716, in which it was held that "a party is not permitted to deny a state of things which his conduct or misrepresentations led another to believe existed and to act in accordance with that belief." In that case a bill was filed by Morgan against the Chicago & Alton Railroad Company. The suit involved the ownership of two strips of land adjoining that over which said company had the right of way, and forming part of its depot grounds in the town of Dwight, and the question was whether these strips of land had been dedicated by the owners thereof for depot purposes for the use of the railroad. Justice Swayne, in delivering the opinion of the court, says: "The appellee insists that the record discloses a case of estoppel in *pais*, and that the appellant is thereby barred from maintaining the claim which he seeks to enforce in this litigation. The principle is an important one in the administration of the law. It not unfrequently gives triumph to right and justice where nothing else could save them from defeat. It proceeds upon the ground that he who has been silent as to his alleged rights when he ought in good faith to have spoken shall not be heard to speak when he ought to be silent"—citing *Bank v. Lee*, 13 Pet. 107. "He is not permitted to deny a state of things which, by his culpable silence or misrepresentations, he had led another to believe existed, and who has acted accordingly upon that belief. The doctrine always pre-supposes error on one side and fault and fraud upon the other, and some defect of which it would be inequitable for the party against whom the doctrine is asserted to take advantage."

The bill alleges that the appellee was cognizant of the manner in which appellant claimed to have acquired title

to said strip of land, and he must be presumed to have known the land he claimed, and yet with all this knowledge he worked in silence for the company that constructed the tunnel, and set up no claim to any portion of said strip until after the tunnel was completed and the railroad constructed through the same. If he had objected when the work was commenced, the appellant might have made other arrangements, or perhaps changed the route. Would it, then, be doing equity to allow the appellee to wait in silence until the railroad was located, and the tunnel completed, and then assert his claim for damages? Surely not. 2 Herm. Estop. § 776, on this point, thus states the law: "If a person having a right, and seeing another person about to commit, or in the course of committing, an act infringing upon that right, stands by in such manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he can not afterwards be heard to complain of the act. This is the proper sense of the term 'acquiescence,' and in that sense it may be defined 'quiescence,' under such circumstances as that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct." In the case of *Boardman v. Railway Co.*, 84 N. Y. 182, Miller, Judge, in the opinion of the court, says: "The principle applicable to such a case is laid down by Lord Denman in *Pickard v. Sears*, 6 Adol. & E. 474, as follows: 'The rule of law is clear that where one by his words or conduct willfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time;'" and Miller, Judge, adds: "Nor is it essential to an equitable estoppel that the party should design to mislead, and it is sufficient if his acts were calculated to mislead, and have misled, another acting upon it in good faith, and exercising reasonable care." So, also, in the case of *Jowers v. Phelps*, 33 Ark. 468, the law in regard to estoppel in *pais* is well stated by English, C. J., as follows: "Estoppels in *pais* de-

pend upon facts which are rarely in any two cases precisely the same. The principle upon which they are applied is clear and well defined. A party who by his acts, declarations, or admissions, or by failure to act or speak under circumstances where he should do so, either designedly or with willful disregard of the interests of others, induces or misleads another to conduct or dealings which he would not have entered upon but for this misleading influence, will not be allowed afterwards to come in and assert his right to the detriment of the person so misled. That would be fraud."

Counsel for the appellee contend that equity has no jurisdiction in this case, because the remedy at law was adequate and complete, the action being trespass on the case for injury done to real property. This Court, however, in the case of *Hanly v. Watterson*, 39 W. Va. 214 (19 S. E. Rep. 536) held that equity is the proper forum in which to assert an equitable estoppel. In that case Hanly obtained an injunction to restrain Watterson from cutting and removing timber from certain lands which he, Hanly, had purchased from one Kirk, and from further proceeding in an action at law which he, Watterson, had instituted against said Hanly for the value of one thousand and thirty trees, *etc.*, claiming damages to the amount of nine thousand dollars, which timber said Watterson claimed under an option from Kirk executed previous to said Hanly's purchase. It appeared from the allegations of the bill that Watterson stood by and saw Hanly's employes removing these trees, and pointed out certain trees to Hanly's employes, and acquiesced in the manufacture of the same into railroad ties, and furnished said Hanly the use of his tramways when removing said timber; and it was held that in such circumstances Watterson was estopped from asserting a claim to said timber, or recovering damages for the cutting and removal of the same. Herm. Estop. § 735, says: "There are many fundamentals of the law which are applicable to and explanatory of this doctrine of equitable estoppel;" and among them he names: "*Volenti non fit injuria*" ("No one can maintain an action for a wrong where he has consented to the

wrong which occasions his loss"); "*Qui non prohibet quod prohibere potest assentire videtur*" ("He who does not forbid what he can forbid seems to assent"); and "*Qui tacet, consentire videtur*" ("He who is silent appears to consent"). What more potent evidence could the Norfolk & Western Railroad Company have wished or desired of a want of claim or interest on the part of George W. Perdue in said strip of land than was furnished by his acts in assisting in the construction of the tunnel through the land he now claims, without asserting any claim or raising any objection?

Now, as to what constitutes an equitable estoppel, 2 Pom. Eq. Jur. § 802, says: "Equitable estoppel, in the modern sense, arises from the conduct of a party, using that word in its broadest meaning, as including his spoken or written words, his positive acts, and his silence or negative omission to do anything. Its foundation is justice and good conscience. Its object is to prevent the unconscientious and inequitable assertion or enforcement of claims or rights which might have existed or been enforceable by other rules of law unless prevented by the estoppel; and its practical effect is, from motives of equity and fair dealing, to create and vest opposing rights in the party who obtains the benefit of the estoppel. The doctrine of equitable estoppel is pre-eminently the creature of equity." In section 803, the author says: "It is accurate, therefore, to describe equitable estoppel in general terms as 'such conduct by a party that it would be fraudulent or a fraud upon the rights of another for him afterwards to repudiate and to set up claims inconsistent with it.' This use of the term has long been familiar to courts of equity, which have always treated the word 'fraud' in a very elastic manner. The meaning here given to 'fraud' or 'fraudulent' is virtually synonymous with 'unconscientious' or 'inequitable.'" Again, in the same section, he says: "When all the varieties in equitable estoppel are compared, it will be found, I think, that the doctrine rests upon the following general principle: When one of two innocent persons—that is, persons each guiltless of an intentional moral wrong—must suffer loss, it must be borne by that one of them who by his conduct, acts,

or omissions has rendered the injury possible." And, also, in section 804, the same author says: "From the foregoing general description it will appear, I think, that the following definition is accurate, and covers all phases and applications of the doctrine: 'Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who, on his part, acquires some corresponding right, either of property, of contract, or of remedy.'"

The essential elements constituting the estoppel are set forth in section 805 of the same work, as follows: *First.* There must be conduct, acts, language or silence amounting to a representation or a concealment of material facts. *Second.* These facts must be known to the party estopped at the time of said conduct, or at least the circumstance must be such that knowledge of them is necessarily imputed to him. *Third.* The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel at the time when such conduct was done, and at the time it was acted upon by him. *Fourth.* The conduct must be done with the expectation that it will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be so acted upon. There are several familiar species in which it is simply impossible to ascribe any intention or even expectation to the party estopped that his conduct will be acted upon by the one who afterwards claims the benefit of the estoppel. *Fifth.* The conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it. *Sixth.* He must in fact act upon it in such a manner as to change his position for the worse. In other words, he must so act that he would suffer a loss if he were compelled to surrender or forego or alter what he has done by reason of the first party being permitted to repudiate his conduct, and to assert rights inconsistent with it." And, again, in section 807, the same

author says: "The general rule is that if a person interested in an estate knowingly misleads another into dealing with the estate as if he were not interested, he will be postponed to the party misled, and compelled to make his representation specifically good. It applies to one who denies his own title or incumbrance when inquired of by another who is about to purchase the land, or to loan money upon its security; to one who knowingly suffers another to deal with the land as though it were his own; to one who knowingly suffers another to expend money in improvements without giving notice of his own claim, and the like. * * * In the language of the most recent decision, to preclude the owner of land from asserting his legal title or interest under such circumstances, there must be shown either actual fraud, or fault or negligence equivalent to fraud, on his part, in concealing his title, or that he was silent when the circumstances would impel an honest man to speak," *etc.*

Applying these principles to the facts stated in the bill, and which are conceded upon demurrer, my conclusion is that the Circuit Court erred in sustaining the demurrer to the plaintiff's bill, and in dissolving the injunction awarded in said cause. The decree complained of is therefore reversed, and the cause remanded, with costs.

CHARLESTON.

STATE FOR USE, &c., *v.* HALL *et al.*

Submitted January 28, 1895—Decided April 6, 1895.

1. PLEADING—JUDGMENT—DECLARATION.

A judgment on a verdict for the plaintiff virtually overrules all demurrers to the declaration and each count thereof.

2. INJUNCTION—BOND—DAMAGES—DECLARATION.

Where the condition of an injunction bond in pursuance of the statute provides that the plaintiff in the injunction cause shall faithfully prosecute said injunction, and shall pay the amount of the judgment enjoined, and all such costs as may be awarded

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against the complainants, and all such damages as shall be incurred in the case the injunction be dissolved; in a suit upon said injunction bond to recover damages incurred by reason of the suing out of said injunction, the declaration must aver that the plaintiff in the injunction, by reason of the dissolution thereof, has incurred and become liable to pay the plaintiff in the suit on said bond some amount of damages.

3. INJUNCTION—BOND—ACTIONS ON BONDS.

Where such bond is made payable to the state, suits may be prosecuted from time to time thereon for the benefit of the person injured by the breach of the condition thereof, until damages are recovered in the aggregate equal to the penalty of the bond.

4. INJUNCTION—BOND—ACTIONS ON BONDS—RELATOR.

In such suit it is incumbent on the relator to show title to the judgment enjoined before he would be entitled to recover damages on account of its collections being restrained by the injunction.

COUCH, FLOURNOY & PRICE and P. W. MORRIS for plaintiff in error.

HUTCHINSON, HUTCHINSON & CAMDEN for defendant in error, cited Code, c. 126, s. 4; 31 W. Va. 364; 4 Rob. Prac. 153; 10 Gratt. 499; 11 Gratt. 625; 10 Gratt. 228; 4 Rob. Prac. 1000-1,001; Code, c. 133, s. 12; 31 W. Va. 365-369; 5 Sm. & Mar. 301; 11 B. Mon. 202; 7 Leigh 68; 91 Ill. 434; 5 Cranch C. C. U. S. 291; 73 Mo. 34; 20 S. W. 352.

ENGLISH, JUDGE:

This was an action of debt upon an injunction bond brought in the name of the state of West Virginia (which sued for the use and benefit of D. F. Haymond, sheriff of Ritchie county, W. Va., and as such administrator of the estate of Isaac Lambert, deceased, who sued for the use and benefit of James Taylor) against Cyrus Hall and A. J. Patton, in the Circuit Court of Ritchie county.

The suit was brought upon an injunction bond, the condition of which as set forth in the plaintiff's declaration is as follows: "That is to say, the condition of the above obligation is such that whereas, John S. Porter, for the use of Isaac Lambert, obtained a judgment against the said Cyrus Hall and W. M. Patton at the June term of the County

Court of Ritchie county, 1858, for two hundred and fifty dollars, with interest thereon from the 1st day of September, 1854, and the costs of the action at law, upon which the said Cyrus Hall and William M. Patton have signed a release of errors on said judgment at law; and whereas, the said Hall and Patton have obtained an injunction against the execution of the said judgment allowed by the judge of the Circuit Court of Ritchie county in December, 1867; and whereas, the Circuit Court of Ritchie county, at its spring term, 1877, by an order directed and required the said Hall and Patton to execute and file in the papers of the said injunction cause a new bond upon the said injunction: Now, therefore, if the said Cyrus Hall and William M. Patton shall faithfully prosecute said injunction, and shall pay the amount of the said judgment and all such costs as may be awarded against the complainant, and all such damages as shall be incurred in case the injunction aforesaid be dissolved then the above obligation be void; otherwise to remain in full force and virtue."

For assigning the breach of said condition the plaintiff says that: "Afterwards, to wit, at a Circuit Court for the said county of Ritchie, held on the 26th day of October, 1877, it was by the said Circuit Court, amongst other things, adjudged, ordered and decreed that the injunction theretofore awarded in the said cause in said condition mentioned be, and the same was, dissolved, and that the said James Taylor recover against the plaintiffs in said chancery cause his costs by him about his suit in that behalf expended. And the plaintiff in fact further says that the said costs last mentioned amount to a large sum of money, to wit, the sum of five hundred dollars. And the plaintiff in fact says that said decree so dissolving said injunction was afterwards, to wit, on the 12th day of November, 1881, by the Supreme Court of Appeals of West Virginia, so far as it dissolved said injunction, with costs against the said plaintiffs in said chancery suit, affirmed. And the plaintiff in fact says that the damages to which he is entitled at the rate of ten *per cent.* per annum from the time the said injunction took effect until the said dissolution thereof on such sum as appears

to be due, including the costs recovered at law, have been ascertained to be, and are in fact, one thousand dollars. Nevertheless payment has not been made of said judgment in said condition mentioned, nor of the costs so awarded against the said Hall and Patton in said injunction case, nor of the said damages, and so the condition of said bond is broken, and the plaintiff in fact is injured by the said breach thereof, and the right has accrued to prosecute this suit upon said writing obligatory for the benefit of said James Taylor, relator, and to demand the said sum of one thousand dollars above demanded, and also the said sum of fifteen hundred dollars, costs and damages aforesaid. And the plaintiff further says that the said sums have never been paid by the defendants or either of them, and the plaintiff, by reason of the non-payment thereof, has sustained damages to the amount of twenty five hundred dollars," etc.

It does not appear from the record that the demurrer was ever acted upon by the court. This Court, however, in the case of *Hood v. Maxwell*, 1-W. Va. 219, held that "a judgment on a verdict for the plaintiff virtually overrules all demurrers to the declaration, and each count thereof," and the court in the case under consideration having gone on and given judgment for the plaintiff, must be considered to have overruled the defendants' demurrer.

Did the court err in so ruling? The plaintiff in this case appears from the record to have recovered judgment for a large amount of damages, not only against the principal, but the surety in said injunction bond; and High on Injunctions (volume 2, § 1640) thus states the law: "The sureties in the bond are entitled to stand upon the precise terms of the contract, and their liability will not be extended beyond its terms. When, therefore, the bond is conditioned for the payment of such damages as shall be awarded against the principal by reason of issuing the injunction, an action can not be maintained against the sureties when it is not averred that any damages were so awarded. So if the bond is conditioned for the payment of such costs and damages as may be recovered against the principal for the wrongful suing out of the injunction, there can be no recovery upon the bond

when it is not alleged that there has been a recovery against the principal for wrongfully suing out the injunction." The condition of the injunction bond sued upon complied with the statute, and provided that "if the said Cyrus Hall and William M. Patton should faithfully prosecute said injunction, and should pay the amount of the said judgment and all such costs as may be awarded against the complainants, and all such damages as shall be incurred in case the injunction aforesaid be dissolved, then the above obligation be void; otherwise to remain in full force and virtue." At the time this injunction was dissolved, section 12 of chapter 133 of the Code provided that "where an injunction to stay proceedings on a judgment or decree for money is dissolved, wholly or in part, there shall be decreed to the party having such judgment or decree, damages * * * at the rate of ten *per cent.* per annum from the time the injunction took effect, until such dissolution, on such sum as appears to be due, including the costs; but the court wherein the injunction is may direct that no such damages be paid, or such portion thereof as it may deem just." This law must be regarded as a part of the contract when the bond was executed, and shows that the damages contemplated were such as should be awarded by the chancery court in which the injunction was pending, which court, by the terms of the statute, appears to have had complete control over the question of damages, as it could direct that no such damages be paid, or such portion thereof as it might deem just, and the contract of the surety was to pay such damages as should be thus awarded. Barton, in his Chancery Practice (volume 1, p. 477) after stating the statutory provision says: "The damages thus decreed are in satisfaction of so much of the interest for the time they are given as may not exceed the said damages. * * * The damages are calculated on whatever appears to have been due by virtue of the judgment or so much thereof as was enjoined at the time the injunction was awarded—that is, upon the principal and interest up to that time, and the costs at law; and when there are two defendants to the judgment, and one of them obtains an injunction, which is dissolved, that one only is liable

for the damages, while, of course, the other defendant remains, as before, liable for the principal and interest of the debt, and the costs at law;" plainly indicating that the damages are within the control of, and to be awarded by the chancellor when the injunction is dissolved. In the case under consideration, however, the injunction bill was dismissed by this Court on appeal from a decree of the Circuit Court of Ritchie county, and no damages were awarded, and the declaration does not claim that any damages were awarded in said injunction suit, but does claim that the plaintiff is entitled to ten *per cent.* per annum from the time the said injunction took effect until the dissolution thereof, on such sum as appears to be due, including the costs recovered at law, which have been ascertained to be, and are in fact, one thousand dollars. How said damages have been ascertained or awarded the declaration does not state, but the contract of the surety was to pay such costs as might be awarded against the complainants, and all such damages as should be incurred in case the injunction be dissolved; and we have seen that the law provides how these damages shall be ascertained and awarded, to wit, by the chancery court, when the injunction was dissolved.

In the case of *Tarpey v. Shillenberger*, 10 Cal. 390, the supreme court of that state, in an action against sureties on an injunction bond, the condition of which was that the plaintiff in the suit for whom the sureties undertook, should pay all damages and costs that should be awarded against the plaintiff by virtue of the issuing of said injunction by any competent court and the complaint did not aver that any damages had been awarded, held that such complaint is fatally defective. And in the case of *Anderson v. Falconer*, 34 Miss. 257, it was held that an injunction bond which is conditioned for the payment by the complainant of all such damages as shall be awarded against him "is no security for the general damages which the obligee may sustain from the injunction, but only for such as shall be properly awarded against the complainant; and hence, in an action on such bond, unless the declaration avers that damages have been awarded against the complainant, and that he has failed to

pay them, it will be bad on demurrer." Now, the language of our statute prescribing the condition of the bond is as follows: "With condition to pay the judgment or decree—proceedings on which are enjoined—and all such costs as may be awarded against the party obtaining the injunction, and also such damages as shall be incurred in case the injunction be dissolved," *etc.* Prof. Minor, in his work (volume 4, pt. 2, p. 1525) prescribes the form for a declaration on an injunction bond, which, after setting forth the condition, reads as follows: "And the said plaintiff in fact saith that the injunction aforesaid in the said condition mentioned hath been in due form of law dissolved by an order of the said — court of — county, sitting as a court of chancery, and that costs against the said D. D. have been awarded by said court in the premises to a large amount, to wit, to the amount of — dollars; and the said D. D. hath incurred and become liable, by reason of the dissolution of the said injunction, to pay the said plaintiff damages to a large amount, to wit, the amount of — dollars." Referring to the declaration under consideration, it is at once perceived that it contains no such averment. It does not state that the defendants have incurred or become liable, by reason of the dissolution of said injunction, to pay the plaintiff any sum of money. It does state that the damages to which the plaintiff is entitled "at the rate of ten *per cent.* per annum from the time said injunction took effect until the said dissolution thereof, on such sum as appears to be due, including the costs recovered at law, have been ascertained to be, and are in fact, one thousand dollars." It is silent as to what party he is entitled to have said damages from, or how the amount of damages have been ascertained. It does not state that said damages were incurred by reason of the dissolution of the injunction, or fix the liability for the same upon any person or persons. As we have seen, a declaration has been held bad when it failed to aver that any damages were awarded when the condition of the bond was that the principal should pay all costs and damages that should be awarded against the plaintiff—the statute so requiring. Now, when the statute

requires that the surety shall pay such damages as shall be incurred in cash, if the injunction shall be dissolved, the same rule applies; and, unless the declaration avers that the plaintiff in the injunction, by reason of the dissolution of said injunction, has incurred and become liable to pay the plaintiff some amount of damages, the declaration is defective, and a demurrer thereto should be sustained.

Again, this bond, in pursuance of the provisions of section 1, of chapter 10, of the Code, was made payable to the state of West Virginia; and in section 2 of the same chapter it is provided that suits may be prosecuted from time to time in the name of the state, if the bonds be so payable, for the benefit of the person injured by a breach of the condition of any such bond, until damages are recovered in the aggregate equal to the penalty thereof; but the declaration must show that the relator has been injured by a breach of the condition of the bond. The relator in this declaration, in assigning the breach, avers that payment has not been made of the judgment in the condition of the bonds mentioned, nor of the costs awarded against said Hall and Patton in said injunction case, nor of the said damages; but the declaration fails to show how the relator, James Taylor, acquired any title to said original judgment of two hundred and fifty dollars which John S. Porter to use of Isaac Lambert, obtained in the County Court of Ritchie county against Cyrus Hall and William M. Patton at the June term, 1858; and it is incumbent on said relator to show title to said judgment before he would be entitled to recover damages on account of its collection being restrained by injunction. Barton, in his Law Practice (volume 1, p. 166) in speaking of fiduciary bonds, says: "The action of debt may be maintained upon bonds executed by fiduciaries, such as executors, administrators, guardians, committees, trustees, and receivers, which are made payable to the commonwealth and conditioned for the faithful performance of their several duties by the various officers who execute them. The suit is brought in the name of the commonwealth at the relation of the claimant; but the relator must be the party having

the legal right to the debt"—citing *Allen v. Cunningham*, 3 Leigh 395.

There is nothing, however, set forth in the declaration we are considering that shows the relator's right to recover in the action. It is true that the declaration contains the averment that the damages to which he (plaintiff) is entitled at the rate of ten *per cent.* per annum from the time the said injunction took effect until the dissolution thereof on such sum as appears to be due, including the costs recovered at law, have been ascertained to be, and are in fact, one thousand dollars, but it neither avers the ownership of the judgment nor in any manner states how he acquired title to said judgment, interests and costs, nor does said declaration state how said relator was damaged by the delay caused in the collection of said judgment by reason of said injunction.

In the case of *Tazewell v. McCandlish*, the Court of Appeals of Virginia, in 10 Leigh, p. 116, ruled upon a similar question as follows: "In debt in a Circuit Court, upon the official bond of the marshal of the late superior court of chancery for the district, the breach assigned in the declaration is that, the chancery court having, in a suit therein pending, in which the relator was defendant, made an order directing the marshal to take possession of certain slaves—averred to be the property of the relator—and hire them out until the further order of the court, the marshal accordingly took possession of the slaves, hired them out, and collected the hires, but failed to pay them over to the relator, 'to whom they belonged, and who was entitled to receive them from the marshal, as would appear by reference to the record and proceedings in the said suit remaining in the office of the Circuit Court. On general demurrer to the declaration, held, the assignment of the breach is defective in substance, the title of the relator to demand and receive the hires from the marshal not being sufficiently set forth.' " Tucker, President, in delivering the opinion of the court, said: "I am of opinion that the judgment in this case—which sustained the demurrer—should be affirmed, the declaration being radically defective, as it shows no right of action in the rela-

tor;" and, after setting forth the material facts averred in the declaration, he says: "To this declaration the defendant filed a general demurrer, which, of course, only brings in question the substantial character of the declaration. I am of opinion that it is defective in substance in this: that it nowhere shows any title in the relator to sue." So, in the case under consideration, no averment in the declaration shows any title in the relator to sue. In order that the relator should have been entitled to the damage caused by the injunction, the declaration should have shown him entitled to the judgment which was enjoined. It avers that the damages which he is entitled at the rate of ten *per cent* per annum from the time said injunction took effect until the said dissolution thereof, on such sum as appears to be due, including the costs recovered at law, have been ascertained to be, and are in fact, one thousand dollars, but it does not show how he was entitled to the damages, how any sum appears to be due, and in what manner the damages have been ascertained, or why he is entitled to said damages.

For these reasons the court erred in overruling the demurrer. The judgment complained of must be reversed, and the cause remanded, with costs.

CHARLESTON.

TOWN OF DAVIS v. DAVIS.

Submitted January 25, 1895—Decided April 6, 1895.

1. NUISANCE—TOWN COUNCIL—MERRY-GO-ROUND.

Under Code, chapter 47, section 28, giving the council of a town power to abate a nuisance, but not prescribing the methods of procedure, upon a petition signed by fifty residents, supported by two affidavits fully describing the alleged nuisance, a merry-go-round, and praying that the owner might be summoned before the town council, a summons signed by the mayor only in the nature of an order to show cause, and reciting the facts set out in the petition, was issued. *Held*, that the procedure and summons were sufficient.

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2. NUISANCE—TOWN COUNCIL—WRIT.

A summons in the nature of an order to show cause, issued by a town council to a person charged with keeping a nuisance, not being a writ or process, within the meaning of Const. Art. II, sec. 8, need not run in the name of the state.

3. CONTINUANCES—MAYOR—JUSTICE OF THE PEACE.

Code, chapter 50, section 58, providing for continuances in actions before a justice, does not apply to proceedings before the mayor under chapter 47, section 39, making it the special duty of the mayor to preserve the peace and good order of the town.

4. NUISANCE—TOWN COUNCIL—MAJORITY.

Code, chapter 47, section 28, giving the council power to abate anything which, in the opinion of a majority of the whole council, shall be a nuisance, does not require the recorder, or more than a majority of the council, to be present at the hearing of a petition to abate a nuisance.

5. NUISANCE—TOWN COUNCIL.

Where the law gives the council of a town ample power to abate nuisances, and the council gives the person charged with maintaining the nuisance opportunity to be heard, it is unnecessary to resort to a court of equity for relief.

6. NUISANCE—TOWN COUNCIL—JUDICIAL PROCEEDING.

A proceeding by a town council against a person for maintaining a nuisance is judicial in its character, and the decision is subject to review.

7. TOWN COUNCIL—REMEDY—*Certiorari*.

Where a person accused of maintaining a nuisance feels aggrieved by the decision of a town council, his remedy, if the statutes gives no appeal, and no question is made that the statute is unconstitutional, or that the town authorities did not have jurisdiction of the subject-matter, is by *certiorari*, and not by prohibition.

8. NUISANCE—*Certiorari*—SUPREME COURT OF APPEALS.

The Constitution, Article VIII, section 3, giving the Supreme Court of Appeals jurisdiction in cases of *certiorari*, and not the clause fixing the court's jurisdiction by the value of the matter in controversy, determines the court's jurisdiction when error is brought on the ground that the Circuit Court refused defendant a writ of *certiorari* on a conviction by a town council for maintaining a nuisance.

A. M. CUNNINGHAM for plaintiff in error, cited 73 Ind. 284; Wood's Law of Nuis., p. 76; 20 N. J. Eq. 530; 118 Pa. St. 402; Am. & Eng. Ency. Law, vol. 16, 922; 3 Paige (N. Y.) 218; 34 W. Va. 804; 29 W. Va. 48.

C. W. DAILEY and C. O. STRIEBY for defendant in error,

cited Code, c. 47, s. 28; Dill. Mun. Corp. 374-378; 2 Tuck. Comm. 303; 4 Min. Inst. 754; 51 Me. 503; 34 W. Va. 804; 16 Am. & Eng. Enc. Law 928; Wood Nuis. § 809; 33 Conn. 118; 50 Md. 517; 57 Pa. St. 274; 29 W. Va. 48; Code, c. 110, s. 1; Id. c. 47, s. 28; 28 W. Va. 227, 232; 13 W. Va. 358; 22 Gratt. 454; Dill. Mun. Corp. (Ed. 1881) §§ 94, 95; L. R. 4 Ch. App. 388.

HOLT, JUDGE:

This was a proceeding on the part of the incorporated town of Davis against S. T. Davis, to have declared to be and abated, as a nuisance, a steam riding gallery, commonly called a "merry-go-round," operated by defendant Davis in the town, on lot No. 73. Such proceedings were had that the town council, by judgment rendered on the 10th day of August, 1894, declared the same to be a nuisance, and ordered it to be abated—to be stopped, we infer. On the 17th day of August, S. T. Davis presented to the Circuit Judge, in vacation, his petition for a writ of *certiorari*, but on mature consideration it was refused, and to such refusal this writ of error was granted. Defendant Davis appeared at the time and place mentioned in the process before the members of the town council, and moved to quash and dismiss the summons, as unauthorized by law, and as otherwise faulty and defective.

Was such motion improperly overruled? Section 28 of chapter 47 (see Code, 1891, p. 426) which defines the powers and duties of the council, and among them the power to prevent injury and annoyance to the public or to individuals, and to abate, or cause to be abated, anything which, in the opinion of the majority of the whole council, shall be a nuisance, does not prescribe the forms and methods of procedure. Therefore they are allowed a wide discretion, within the limit of reasonable fairness. In this case there was a petition and information, signed by fifty residents of the town, supported by two supplementary affidavits, suggesting the location of the riding gallery, the name of defendant as the owner operating it, and praying that he might be summoned to show cause why the same should not be declared to be a nuisance and abated, being complained of as both

a public and private nuisance. Upon this the summons in the nature of a *scire facias*, or rule to show cause, was issued. It gives the defendant notice of the injury and annoyance suggested and complained of, commands the officer to summon him to appear at a certain time and place "to show cause, if any he can, why the steam riding gallery, commonly known as the 'merry-go-round,' owned by him, and operated on lot No. 73, as shown by the map of the town of Davis, between the hours of eight and ten p. m. each day, since the 3d day of August, 1894, until this date, shall not be declared a nuisance, and abated as such. (Dated and signed by the mayor.)" I know of no law requiring it to be signed by the members of the council. In view of the purpose the summons and forms of procedure are intended to accomplish and subserve, I can call to mind no more short, simple and efficient form than this, to give the party written notice of the thing complained of, the relief asked, and of the time, place and tribunal when and where he is to appear and show cause why the same should not be granted. As to the authority for it, it finds justification in the forms of the various writs of *scire facias* and rules to show cause which have been in use for the like purpose time out of mind. They were used before the ordinary distinctive forms of common-law actions came into existence, and they still survive as efficient and simple methods of notice and procedure in daily use.

But it is said that it is a writ, and void because it does not run in the name of the state, as required by section 8, article II of the Constitution. See Code, 1891, p. 21. I do not regard it as a writ or process of any tribunal acting as a court, but simply a notice, in the name and on the behalf of the town of Davis, that defendant should appear before the council at the time and place designated, and show cause, if any he could, why they should not, in the exercise of their police power, abate his riding gallery, as a nuisance—a method deemed expeditious enough to meet the exigencies of this particular case, and certainly proper in itself, and fair to the defendant; for it not only gave him an opportunity to show cause, but to remove or stop it himself if he saw fit.

The defendant demanded, as matter of right, a continuance of the cause for seven days, as allowed by section 58 of chapter 50 of the Code in an ordinary civil action before a justice. This was refused, but the further hearing was deferred for twenty four hours.

Such refusal was not error, for three reasons: *First.* It was not a cause within the meaning of that section. Nor was the mayor acting as a justice of the peace to try a case between parties, but as the chief executive officer of the town, according to section 39 of chapter 47 of the Code, which makes it his especial duty to see that the peace and good order of the town are preserved, and that persons and property therein are protected. Therefore, when fifty residents lodged with him their sworn information and complaint of a nuisance, and asked its abatement, and that defendant might be cited before the council to show cause, if any he had, against it, the mayor caused such citation to be issued and served, in the name and on the behalf of the municipality, for a hearing of the matter before the common council, having first fixed the time and place. *Second.* If, within the meaning of the section, defendant made no affidavit, and in such case the statute requires it. *Third.* And when the examination took place, on the next day, defendant appeared with, and examined on his own behalf, some twenty five witnesses.

Again it is said there was error because the council heard the case when the recorder was absent. Section 27 of chapter 47 says, "The mayor and recorder shall vote as members of the council." But section 24 of chapter 47 says, "A majority of the council shall be necessary to form a quorum for the transaction of business." And the inference is that no greater number is required, unless the law in the given case specially makes the presence of the whole, or such greater number, necessary. I can find no such law. The section relied upon for this contention is section 28, which says the council shall have power to abate, or cause to be abated, anything which in the opinion of a majority of the whole council, shall be a nuisance. This does not mean that more than a quorum must in such case be present, but that a ma-

jority of the whole, including those absent as well as those present, must concur in such opinion. Here five out of the whole seven concurred in the opinion to abate.

The defendant urges that the remedy by injunction should have been resorted to. In most cases—in many cases, rather—it is hard to conceive of a judicial remedy more full and complete, more flexible in adaptability to the peculiar exigencies and ever-varying requirements of the cases, or, what may be more to the point, more simply efficient and speedy; so much so that it has become a common judicial remedy in a common criminal nuisance, where abatement is necessary, and in a large class of cases has well-nigh superseded actions of law, except, perhaps, where *mandamus* is added to what we would call common-law suits, as an ancillary remedy, or mode of carrying a specific judgment into effect. But I take it for granted that some sort of a nuisance, great or small—and many of a petty character—arises almost every day in cities and towns. It would be intolerable to have to apply to a Circuit Court, in such cases; and it would seem not to be necessary under this statute, in most cases, where the party is properly heard before he is condemned, though it is easy to imagine grave and perplexing questions where such resort to the ordinary courts would be prudent and discreet, and especially safe, on the part of the common council. Long experience, the great practical test of general fitness and convenience in such matters, has shown that self-governing municipalities must have large powers over such affairs, for the prevention of injury and annoyance to individuals, and the protection of the public from things dangerous, offensive, or unwholesome; in other words, to see that each one has the full enjoyment of his rights of life, liberty and property, and therefore that each one shall so use such rights of his own as not to invade or injure those of another. This is the main purpose of their creation, and the chief function in their existence; so that their fair and honest efforts in that behalf should be liberally construed, and steadily upheld. But, on the other hand, it would be intolerable for such local municipal authorities of a town to meet in private, and declare a

particular thing to be a nuisance, without giving the party an opportunity to be heard and show cause against it. See *Yates v. Milwaukee*, 10 Wall. 498. Hence what seems to me to be the fair and prudent course was pursued by the mayor and council of the town of Davis in this instance.

Now the question arises, and has been discussed, what is the nature of such proceeding? It is plainly judicial in its character. I hardly see how it can be regarded otherwise. It is true that it is in the exercise of the general police power delegated by the legislature. But is the judicial ascertainment of a fact in a proceeding in the concrete case against a particular person and thing, after due notice given, in order to ascertain the character or status of the thing as a nuisance, followed by execution of the judgment, any the less a judicial proceeding, in the particular instance, because it is done under the delegated police power? It is merely a concrete case of the administration of justice, like all other cases judicial. This defendant complains of this seizure of his property as unreasonable, the condemnation of it as a public nuisance as unlawful. Can it be that such seizure and condemnation are final and conclusive? It has been held not to be conclusive, and that the party proceeded against can test the validity of the action of the council by *certiorari*, if not by distinct action against the town for damages. See *Cole v. Keyler*, 64 Iowa 59 (19 N. W. Rep. 843).

Neither do I agree with counsel for appellee that his remedy was by prohibition, and not by *certiorari*, for here no question is made that the statute in question is not constitutional, and that the town authorities did not have jurisdiction of the subject-matter; so that if they failed to follow the law, in applying it to the facts of the case, the remedy is by *certiorari*, and not by writ of prohibition. *Mayor, etc., of Montezuma v. Minor* (1883) 70 Ga. 191. The statute gives no appeal in such cases, and, being the creature of statute law, it does not lie, except where it is given by express terms.

The rule with regard to a *certiorari* is the very reverse. It always lies, unless expressly taken away, and it requires very strong words to do so. The reason of this is that it is an extremely beneficial writ, being the medium through

which the court of queen's bench exercises its corrective jurisdiction over the summary proceedings of inferior courts. 2 Smith Lead. Cas. (9th Ed.) p. 998, note to *Crepps v. Durden*. And, so far from this common-law writ being taken away in this state, the constitution, in express terms, gives the circuit court supervision and control over all proceedings before justices and other inferior tribunals by *certiorari* (see Const. Art. VIII, s. 12); and by section 2 of chapter 110 of the Code (Ed. 1891, p. 761) the common-law jurisdiction of the writ is declared, and in every case, matter, or proceeding before a council of a city, town or village it is expressly provided that, subject to certain exceptions mentioned, the record or proceeding may, after a judgment or final order therein, be removed by a writ of *certiorari* to the proper Circuit Court, and such writ may be awarded by the judge in vacation as well as by the court. For mode of procedure see section 4, *etc.*, of chapter 110.

It is true that the question of what is a nuisance in a given case is a very perplexing one, and one that the tribunals are constantly called upon to decide; but so far from that being a reason why it should be left to the sole and unappealable decision of the council, with unlimited power to say what is a reasonable exercise of such power, it must for that reason be liable to frequent and grievous abuse, in the illegal and unnecessary injury of private property and invasion of private right, and must strengthen rather than weaken, the claim of the party affected that he should have the right to subject the proceeding to the scrutiny of the ordinary courts. I think, therefore, that the Circuit Court had jurisdiction of the case.

As we have already seen, this was a summary conviction of defendant for the creation of a nuisance, which has been affirmed in the Circuit Court on *certiorari*. In such a case the clause which determines the jurisdiction of this Court by the value of the matter in controversy does not apply, an appellate jurisdiction is expressly given in cases of *certiorari* by section 3 of article VIII of the Constitution. See Code, (Ed. 1891) p. 38. And even if it were a civil case, and one in which the jurisdiction is to be determined by the value of

the thing declared to be a nuisance, it would not be going far to assume, as a matter of general knowledge, that a steam engine, boiler, riding apparatus, *etc.*, were of greater value than one hundred dollars.

The Circuit Judge to whom the record—made up of the evidence given and proceedings had before the council—was presented, together with a petition praying that a writ of *certiorari* might be awarded, heard the application upon the merits, and refused to award the writ. The question now reached is, was such refusal right? Reviewing the proceeding of the council upon the merits, and determining all questions arising on the law and the evidence, as certified, and rendering such judgment upon the whole matter as law and justice require, should the order of the town council have been affirmed, if the *certiorari* had been allowed?

Many of the questions raised by the plaintiff in error have already been discussed and considered. Was the riding gallery a nuisance at that particular place and time? is the only one that remains. That depends upon the place, the time, the circumstances, the manner in which it was operated, and the effects it produced. Did the noise and crowd, and other effects of this riding gallery, invade any public or private right? Did it materially interfere with and impair the ordinary physical comfort of any one of normal sensibility and ordinary mode of living, in his home or place of business? The place has much to do with it. It seems to have been on a vacant lot in a populous part of the town, with at least four dwellings near by. The time is important. It was operated up to ten and half-after ten o'clock in the night, tending to prevent and disturb sleep, and had been kept up continuously for six days. The attending circumstances are important. It drew to the place a large and noisy and boisterous crowd. The nature of the thing itself is important. It was run by a steam engine. The whistle blew every few minutes. The music played, the gallery ran around, the crowd hallooed, *etc.*, until ten o'clock at night. That it was a mere idle amusement, perfectly legitimate in a proper place, or at a proper time, is not wholly unimportant. That which calls together a disorderly crowd in a public place

was held to be a public nuisance in *King v. Moore*, 3 Barn. & Ald. 184. The making of loud music, with instruments or otherwise, in the night time, to the disturbance of a neighborhood, was held to be a public nuisance in *Rex v. Higginson*, 2 Burrows 1233; *Com. v. Oaks*, 113 Mass. 8; *Com. v. Smith*, 6 Cush. 80. Those who participated did not regard it as a nuisance. Some of the witnesses attended. Some permitted their children to attend. They thought it a harmless amusement for the children. It did them good, rather than harm, and the proprietor was careful, polite, and kept good order. This, I take for granted, is true, at a proper time and in a proper place. Other witnesses lived at a distance. They, of course, were not annoyed, and they thought it was not a nuisance to those who lived near by. Four witnesses who lived close by say that it was a nuisance, disturbed and annoyed them at their homes, and prevented or interrupted their sleep. One witness, who lives on the same street, five lots below, says it was a considerable annoyance, and, to some extent, kept him awake. Quite a number of witnesses who live or do business near by were not annoyed by it, and do not regard it as a nuisance. From all this, and from the general character of such machines in operation, with their usual accompaniments, it is not hard for one to form a pretty accurate opinion on the question involved; that is, that when kept up day and night, for days together, in such a place, it was a decided nuisance to some people, of ordinary sensibility, who lived or had their place of sleeping adjoining or close to the vacant lot No. 73, while to those who lived at a distance, those who participated, and some of those who lived close to the place, it was not a nuisance—did not annoy them to any material extent. Such questions can not be decided by a mere count of those two classes, or by taking a vote of the town. Whether a thing is or is not a nuisance does not depend upon the notions of people living in a designated locality. "No man has a right to take from another the enjoyment of what are regarded by the community as the reasonable and essential comforts of life because the notions of some individuals, or of the people of a given locality, may not correctly estimate the standard of such com-

forts." *Owen v. Phillips* (1881) 73 Ind. 284, 295. See *Snyder v. Cabell*, 29 W. Va. 48 (1 S. E. Rep. 241); *Powell v. Furniture Co.*, 34 W. Va. 804 (12 S. E. Rep. 1085).

On the whole I think that a merry-go-round, run by a steam engine, the whistle of which blew every few minutes, accompanied by a band, and attended by a large, noisy and boisterous crowd till after ten o'clock at night, disturbing some of the people living near by it, is such a nuisance as a town council has power to abate, after proper investigation under Code, chapter 47, section 28.

In reaching this conclusion as to the results produced by the acts complained of, I lay great stress upon the finding of the council—men whose duty it was to ascertain them, and who had a right to observe and inspect for themselves, as well as to hear testimony. The law lays down no fixed method of procedure, and we may well believe that they resorted to means found to be so useful in like cases; that is, they went upon the ground and viewed the place in question and heard and observed for themselves the facts relating to the controversy. See section 30, chapter 116, Code. With this view of the law and the facts of the case, the judgment complained of is affirmed, but by an equally divided court.

DENT, JUDGE (*dissenting*):

Section 28, chapter 47, of the Code, under which these proceedings were instituted, contains two clauses referring to what, under the law in its broadest signification, are classed as nuisances, as follows, to wit: *First*. "To prevent injury or annoyance to the public or individuals from anything dangerous, offensive or unwholesome." *Second*. "To abate or cause to be abated anything which in the opinion of the majority of the whole council shall be a nuisance." The first refers to and includes all such things which, though lawful in themselves, may be conducted, used, or neglected in such manner and to such an extent as will cause them to become an injury or annoyance to the public or individuals, by reason of their becoming dangerous, offensive, or unwholesome, while the second refers to such things as are a nuisance *per*

se, in the opinion of the council; that is, their sound and reasonable discretion. To hold otherwise is to render the first clause nugatory and meaningless, as the word "nuisance," construed in its broadest sense, would cover everything that injures or annoys the public or individuals by reason of its being dangerous, offensive or unwholesome, while in its strictest sense it includes only such things as are an injury or annoyance to all persons who come within the sphere of their operations, though in a greater degree to some than others. For instance, a cesspool throwing off putrid odors or gases; a harsh and grating sound, continuously repeated; the unnecessary obstruction of a public thoroughfare; a dangerous and unprotected excavation or opening of any kind—are all injurious or noisome to every one who may come within their sphere, and hence are nuisances *per se*. But those things which are a source of pleasure and enjoyment to some, while they are a positive annoyance to others, such as singing, dancing, a hand organ, amusements, processions and occupations of all kinds, including a merry-go-round, cats, dogs and children, are not nuisances *per se*, but the world would be a dreary place to many without them. All such things can be indulged in and used in such manner as to make them a nuisance to certain individuals, and yet they may be a continual source of happiness and necessity to a large majority of the people who come within their sphere. The council in determining what is a nuisance *per se*, and therefore to be abated, must use their sound discretion; hence the use of the words, "in the opinion of a majority of the whole council." But they can not hold and abate as nuisance, under the second clause, that which is not, in a greater or less degree, injurious and annoying to all alike who come within its sphere. To give them the power to abate everything which, in the opinion of a majority, was annoying to any individual, would be unjust, unreasonable, destructive of private rights, and contrary to fundamental law.

A merry-go-round is not a nuisance *per se*, and does not come under the second clause, and is therefore not a subject of abatement by the majority of a town council, and the judgment should have been reversed, and the proceedings quash-

ed. The authority to abate given to a town council, should not be construed as a license to do what they please with their neighbor's property, but only to protect the interests of the public. In this case no such interests were at stake, but it was simply a question of whether a few individuals, because of annoyance, real or imaginary, had the right to cause the abatement or destruction of that which afforded pleasure, amusement, exercise, and experience to a much larger number. It may be said that a merry-go-round comes under the first clause. Such is the case. But this prosecution is under the second clause, and the first does not authorize the harsh measure of abatement, but is simply a measure of regulation or prevention. A merry-go-round may be conducted in such manner as not to be offensive to any one, and yet it may be made a source of annoyance to all. In such cases it becomes the duty of the council to prevent its management in such way as to make it an offensive annoyance to a person of ordinary sensibilities; that is, ordinary people, who love their own and their neighbor's children, find a sufficient recompense for all annoyance in their happy enjoyment of innocent pastimes and sports, and observe the golden rule, "As ye would that men should do unto you, do ye even so unto them."

As is said in the case of *Westcott v. Middleton*, 43 N. J. Eq. 483 (11 Atl. 490): "Before the court can condemn a trade or calling, it must appear that it can not be carried on without working an injury or hurt to another; and, as I have said, that injury or hurt must be such as would affect all reasonable persons alike, similarly situated. The law does not contemplate rules for the protection of every individual wish, desire, taste. It is not within the judicial scheme to make things pleasant or agreeable for all citizens of the state." Such a scheme could not be devised by human ingenuity, for it is always too hot or too cold, too wet or too dry, too light or too dark, for some people. Always complaining, never satisfied, morbid, phlegmatic, continually annoyed, fault-finding, looking for slights, easily offended, hysterical, captious, haters of children and their enjoyments, a misery to themselves and a heaviness to their friends, is

their history; and for such the law affords no remedy, as it can not administer to a mind and heart diseased. On the judgment of such it is never safe to condemn a lawful calling as an offensive annoyance. The conduct of this merry-go-round was a legitimate business—just as much so as the selling of ribbons or flowers for hats, cigars or pipes, or sweetmeats or candies, and as useful or beneficial. The council, before regulating it, should have found out wherein it was offensive, and then have compelled the manager to submit to necessary rules to reduce its offensive characteristics as much as possible, and, if necessary, to lop off some of the offensive contingents.

To testify that a thing is a nuisance does not make it so, but the witness must testify to the annoying characteristics. R. W. Eastman testified "that he goes to bed early and gets up early; that he sleeps best the first part of the night; that the noise of the merry-go-round interrupted him from sleeping; that his wife had the headache one night, and it annoyed her from sleeping; that the crowd around the merry-go-round hallooed and made a noise, and that the music annoyed him." To go to bed before 9:50 p. m. on a sultry summer night is out of the ordinary rule, in towns the size of Davis, and this was the hour the amusement stopped. Neither does ordinary music annoy the ordinary man, especially when in bed, nor should the joyous shouts of children at play. So far as his wife was concerned, she certainly was guilty of contributory negligence in having the headache; and, as to which caused her to lose sleep, she was the best witness. George Amlaw says the music annoys him from sleeping. Wilbur Patriquan says he is annoyed out of one hour's sleep each night. F. A. Cruikshank says: "The music and whistle from the engine annoy me. I imagine the whistle blows every five minutes, if it don't blow." George S. Ramsey says it slightly annoyed his little girl when she was sick. But he considers it a great source of amusement, and not a nuisance. C. E. Wolford says: "It keeps me awake some. It makes considerable annoyance." This is the substance of all the evidence in favor of the prosecution. Three were annoyed by the music, one by the noise of the crowd, one by the whistle, which he imagined blew, whether

it did or not; and, being early bed-goers, they were each cheated out of from half to one hours sleep each night. This is the evidence of nuisance on which the judgment of abatement was founded, and the defendant deprived of his legitimate business. If the whistle was an offensive annoyance, the council could have prevented its blowing. If the music was an offensive annoyance, the council could have required the playing of tunes low and soothing, or stopped it altogether. The children's mirth and laughter could have been suppressed in the same manner, and their shouting could have been prevented by the promise of a free ride. And, that these witnesses should enjoy their twilight rest, they could have caused the "machine" to abate at early candle-lighting, or when the chickens go to roost. "The power to abate nuisances, like all other powers, must be exercised reasonably." It is not unlimited power, but only such as is reasonably necessary for the public good. The general authority to declare what is a nuisance will not "justify the declaring of acts, avocations, or structures, not injurious to health or property, nuisances." *Teass v. City of St. Albans*, 38 W. Va. 1 (17 S. E. Rep. 400).

On the side of the defense, twenty three witnesses testify that it is an innocent, harmless, healthful amusement, which the children enjoy very much; that the music is greatly enjoyed, is a pleasant soporific, and that there is really not enough of it; that it is conducted in an orderly, careful manner, and is beneficial to the community. They fully establish it to be of great utility and benefit to the public, instead of being a nuisance. If the testimony of the prosecution was sufficient, that of the defendant has a decided preponderance. The evidence, and the law independent of the evidence, was for the defendant, and such should be the judgment of the Court. The attempt was once made to enjoin the erection of a schoolhouse, for the reason that it was a nuisance. How would the public regard such an attempt at the present time? All other buildings must give way to public schoolhouses, and the education, elevation, comfort and happiness of the children is considered a primary duty of mankind; and anything that contributes to their harmless amuse-

ment should receive the encouragement of the public conscience, rather than be placed under the ban of the law. The power to abate, if it exists, should never be exercised by a town council when the power to regulate will accomplish the same end without the destruction of property or of a lawful avocation.

BRANNON, JUDGE (*dissenting*):

I can not agree that a merry-go-round is a public nuisance, to which the harsh and vigorous remedies provided by law for public nuisances shall be applied. This merry-go-round is not proven a nuisance, and is not, in its nature, such. It is an amusement from which children derive great pleasure and enjoyment, and, with them, their parents. A great many most respectable grown people enjoy their presence in our towns. They want that element necessary to stamp them as nuisances—that their harm or annoyance shall be so extensive as to affect the public at large, not merely a few persons. Many things annoy, perhaps hurt, a few persons, but a few must not make law for the many. A band discoursing music in a park, very frequently, in summer, no doubt, annoys aged or sickly persons in the neighborhood, and others tired of its music, from repetition; and shall we say it is a nuisance? Shall we say a church wherein, for weeks, religious revivals are held until late at night, is such? Is the ringing of church bells? Are theatres and circuses? Are even billiard tables and bowling alleys that are open until late in the night? Many things annoy a few; but they can not deny the rights, even the amusements or pastimes, if decent, and not immoral, of the many. They must submit to the inconvenience peculiar to themselves. I do not attempt a discussion at large. We must not make government too rigid and exacting, upon even the amusements of the people, else it becomes, in their eyes, an engine of oppression and tyranny. The action of the council in this case, under the form of law, took away the right of the owner to use his property to earn a livelihood, and invaded the right of the people to go to a decent

place for harmless and pleasurable amusement. If the company frequenting such places, as it seldom or never does, becomes disorderly or immoral, that is a matter of police control, but does not make a merry-go-round a public nuisance.

CHARLESTON.

WEST *et al.* v. RAWSON, JUSTICE OF THE PEACE, *et al.*

Submitted January 28, 1895—Decided April 6, 1895.

1. **GRIST MILL—TOLL—JUSTICE OF THE PEACE.**

The five dollars' forfeit prescribed by law (section 37, chapter 44, Code) to be paid by the proprietor of a grist-mill to his customer for taking more toll than allowed by the statute may be recovered in a civil proceeding before a justice of the peace.

2. **JUSTICE OF THE PEACE—JURISDICTION—WRIT OF PROHIBITION**

Where such justice has jurisdiction of the subject-matter in controversy, and does not exceed his legitimate powers, a writ of prohibition should not be granted.

F. A. BROWN for plaintiffs in error, cited Code, c. 44, s. 37; Id. c. 36, ss. 3, 4, 5, 6; Id. c. 50, ss. 219-230; Code 1819, vol. 2, p. 58; Code 1849, c. 43; Code, c. 50, ss. 8, 9, 10, 11, 12; Code 1849, c. 150, s. 1; Code 1860, c. 150, s. 1; Const. Art. III, s. 14.

CASTO & LOCKHART for defendant in error, cited 21 W. Va. 134; Code, c. 44, s. 37; 6 Gratt. 481; Code, c. 36, ss. 1, 2, 3, 4, 5; 3 Rob. (New) Pr. 382-3; 18 S. E. Rep. 280; Code 1819, vol. 2, p. 228-9.

HOLT, PRESIDENT:

Upon a writ of error to the judgment of the Circuit Court of Wirt county rendered on the 21st day of June, 1894, refusing to award plaintiffs in error (defendants before justice below) a writ of prohibition.

The plaintiffs in error, O. West and others, are the owners of a grist-mill in the county of Wirt. John Lockhart, one of the defendants, took grain to the mill, to be ground

40	480
42	38
40	480
55	478

for the consumption of himself and family. He complained that the proprietors of the mill took for toll more than the statute allows, and accordingly brought suit before W. J. Rawson, a justice of the peace, against West and others, to recover five dollars, the sum which the statute declares the proprietor of the mill shall forfeit to the party injured for such violation.

Such proceedings were had before the justice that the cause was ready and about to be tried when defendant West applied for and obtained from the Circuit Judge, in vacation, a rule against W. J. Rawson, the justice, and John Lockhart, the plaintiff, to appear at a time and place designated, after being served with a copy of the order, and show cause, if any they could, why a writ of prohibition should not be awarded commanding Rawson, the justice, and Lockhart, the plaintiff, to cease from further proceeding in said action then pending before the justice. On the 27th day of March, 1894, the plaintiffs, O. West and others, appeared in court, and on their motion the rule having been served, their motion for writ of prohibition was docketed. On the 6th day of April, defendant Lockhart tendered his answer to the rule, and the same was ordered to be filed. On the 21st day of June, West and others moved the court to strike out the answer, but the court overruled the motion; and the cause then coming on to be heard upon the pleadings and evidence, including the transcript of the record of the proceedings pending before the justice and argument of counsel, the court was of opinion that plaintiffs, West and others, did not show themselves entitled to the writ, and gave judgment that the same should not issue, dismissing the rule, with costs.

The only question of importance turns upon the meaning and application, with reference to the jurisdiction of a justice, of section 37 of chapter 44 of the Code (Ed. 1891, p. 358) which reads as follows:

“Sec. 37. At every mill which grinds grain, whether the same be established under an order of the court or not, there shall be well and sufficiently ground, all grain brought to the mill for the consumption, when ground, of the person

bringing or sending it, or his family, and in due turn as the same is brought, and within a reasonable time thereafter; and there shall not be taken for the toll more than one eighth part of any grain of which the remaining part is ground into meal, nor more than one sixteenth part of any grain of which the remaining part is ground into hominy or malt. If at any mill there be a violation of this section in any respect, the proprietor thereof shall, for every such violation, forfeit to the party injured five dollars; but with these provisos, that the proprietor shall not be obliged to run more than one pair of stones to grind grain brought to the mill for consumption of the persons bringing or sending it, or their families, and that such proprietor may grind grain for the consumption of his family in preference to that of others."

This statute, in its main features, has a long history, going back to the acts of 1748 (see 6 Hen. St. pp. 58, 59) and has been kept up in every revisal of statutes from that time to this. I have not been able to find any case where this section has called for construction, but it was the practice to bring actions of debt in such cases under the Code of 1849, and I can discover no material change. See Code 1849 (Ed. 1860, p. 370) c. 63, s. 12. If the statute prohibits the doing a thing under a penalty, and does not prescribe any mode of recovery, an action of debt may be maintained. Com. Dig. "Action upon Statute," F; 2 Bac. Abr. "Debt" A; *Sims v. Alderson* (1836) 8 Leigh 479. Here no mode is prescribed. By section 28 of article VIII of the Constitution the civil jurisdiction of a justice of a peace extends to actions of *assumpsit*, debt, detinue and trover, if the amount does not exceed three hundred dollars; that is, all causes of action for which these might be brought; and, under power conferred on the legislature by the same section, it has, in chapter 50 of the Code, made this civil jurisdiction still broader.

The plaintiffs in error contend that the five dollars prescribed by the statute, as the forfeit to be paid by the proprietor of the grist-mill to his customer for taking more toll than what is allowed by law, *viz.* one-eighth, can not be recovered before a justice in a civil proceeding; that it only

can be recovered either by presentment or indictment in the Circuit Court, or by criminal warrant and arrest before a justice; that a justice has no jurisdiction of the subject-matter at all, or, if jurisdiction, it is only on a criminal warrant, and not by any civil proceeding, and therefore the Circuit Court erred in refusing a writ of prohibition.

We do not think, however, that they made good the contention. Chapter 36 of the Code (the one in part relied on) relates to the mode of recovering fines. It provides that the term "fine" shall include every pecuniary penalty or forfeiture, and that it shall be to the state for the support of free schools, unless it is otherwise expressly provided, or would be manifestly inconsistent with the intention of the legislature. Here, as we have seen, it is otherwise expressly provided, for section 37 of chapter 44 says in so many words that the forfeit of five dollars shall go to the party injured; and Mayo, in his Guide (page 673) gives a civil warrant as the form for its recovery. In certain cases the informer or prosecutor is entitled to have a part of the fine, and no more. See Code, c. 36, s. 12. Here the whole goes unconditionally to the injured party, and, in no event or contingency does any part go to the state. Then, why should the state sue or prosecute for a penalty in which in no contingency it has any interest? And, as no costs can be recovered against the state, the mill owners would think it a great hardship, and quite a one-sided affair, that any customer could sue them with impunity without any risk as to the payment of costs on failure to make out a case; yet the mill owner must pay and pay always, to some extent, whether he gains or loses.

We are of opinion that the justice of the peace does have, by civil action, jurisdiction of such cases; and in this case Justice Rawson was in no particular exceeding his legitimate powers; and that the judgment of the Circuit Court in refusing the writ of prohibition was right. Judgment affirmed.

CHARLESTON.

YEAGER v. CITY OF BLUEFIELD.

Submitted January 19, 1895—Decided April 6, 1895.

1. PLEADING—DECLARATION—SPECIAL DAMAGES—PARTICULAR INJURY.

A declaration in case against a city for personal injury by reason of a defect in a street crossing, alleging that the plaintiff fell, and thereby was "greatly injured, bruised, wounded and crippled," is not bad because it does not state the particular injury, as a broken leg, for instance. Where special damages consequent on the particular injury are claimed, it seems otherwise.

2. EVIDENCE—EXCLUSION OF EVIDENCE.

Where the plaintiff's evidence appreciably tends to sustain the action, the court ought not to strike it out.

3. EVIDENCE—VERDICT—REVIEW OF EVIDENCE.

Under section 9, chapter 131, Code, 1891, when exception is taken to the action of the court upon a question involving evidence on a motion for a new trial or otherwise, all the evidence, conflicting or not, may be certified, and this Court must consider all such evidence, whether conflicting or not, not rejecting any from consideration. If, upon such evidence, the verdict plainly appears to be contrary to or without sufficient evidence, plainly against the decided and clear preponderance of evidence, it may be set aside, though the evidence be conflicting. This power should be exercised with great caution.

4. MUNICIPAL CORPORATIONS—STREETS AND SIDEWALKS.

A municipal corporation is not an insurer against accidents upon streets and sidewalks. Nor is every defect therein, though it may cause the injury sued for, actionable. It is sufficient if the streets are in a reasonably safe condition for travel in the ordinary modes, with ordinary care, by day or night; and whether so or not is a practical question to be determined in each case by its particular circumstances.

5. MUNICIPAL CORPORATIONS—LIABILITY.

While the liability of municipal corporations is in its nature absolute, that does not refer to the cause of action. That must exist before the liability arises.

JOHNSTON & HALE for plaintiff in error, cited 37 W. Va. 579; 37 W. Va. 115; 31 W. Va. 478; 35 W. Va. 406; 34 W. Va. 465; 33 W. Va. 718, 723; 16 W. Va. 326; 54 Am. Dec. 467; Code, c. 43, s. 53; Id., c. 43, s. 7.

40	484
42	220
42	801

40	484
43	670

40	484
44	573

40	484
47	318

40	484
51	254
51	398
51	401

40	484
54	518
40	484
57	293

40	484
58	314

40	484
61	240

40	484
62	565
62	575

40	484
64	84
64	134
65	275
65	491

40	484
66	688

JOHN McGRATH for defendant in error, cited 16 W. Va. 307; 37 W. Va. 606; 31 W. Va. 386; 19 W. Va. 323; 35 W. Va. 682; 127 Mass. 329; 131 Mass. 443; 97 Mass. 268, 272; 122 N. Y. 430; Whar. Neg. §§ 980, 996; Code, c. 47, s. 28; 32 W. Va. 55; 33 W. Va. 547; 31 W. Va. 842; 37 W. Va. 111; 38 W. Va. 273; 35 W. Va. 389; 37 W. Va. 579; 99 N. Y. 654; 20 N. W. Rep. 668; 110 Mass. 131.

BRANNON, JUDGE:

This was an action of trespass on the case in the Circuit Court of Mercer county by Theodore Yeager against the city of Bluefield to recover damages for the breaking of the plaintiff's leg, on the allegation that it resulted from defect in the crossing over one of the streets, in which there was a verdict for three thousand five hundred dollars and a judgment. The city brings the case here.

There is an objection to the declaration, the point of the objection being that it is too general in its statement of the injury to the plaintiff's person—the allegation being that by reason of his fall he “was greatly injured, bruised, wounded and crippled, and put in great danger and peril”—and that it should have alleged that his leg was broken. No authority is cited to sustain this point, but it seems to be relied upon with confidence. I think the declaration sufficient on this point. The plaintiff sues for a bodily injury. That is clearly alleged. That his leg was broken is only a fact evidentiary of the ultimate fact predicated; that is, that he was injured, bruised, wounded and crippled. Pleadings need not state evidence, but only ultimate facts shown by the evidential facts—the ultimate facts—else there would be endless prolixity, as ultimate facts may include many subordinate or evidential facts. Often it is imprudent to allege such facts, as it produces variance. 1 Chit. Pl. 407. See *Hawker v. Railroad Co.*, 15 W. Va. 635. If a man's wagon is broken by reason of a road's defects, he can charge that it was injured, broken and rendered useless, without saying its axles and wheels were broken. I have found very little pointed law on the subject, common as the matter seems, and it is a matter not without practical importance.

In *Corey v. Bath*, 35 N. H. Rep. 531, a case for personal injury from defect of a highway, the very point was maturely considered, and it was held that it was not necessary that the injuries received by the plaintiff should be particularly described in the declaration. It is enough if it shows that the plaintiff received a bodily injury. I have found nothing to the contrary. The rule contended for would condemn precedents long approved and everywhere used in assault and battery, which are of same nature as the declaration in such cases as this. Declarations for assault and battery allege that the defendant did beat, wound and ill treat the defendant, without saying how he did beat him or wound him, without giving the mere manner of wounding. So with indictments for that offense. This is the rule where only general damages are claimed. Where special damages are claimed, it is different. For instance, if the plaintiff were engaged in any business requiring specially the use of the limb, and the injury unfitted him for that business, then the injury to that limb, I think, should be specified, as its result or consequences in the particular case would be loss of business. 1 Chit. Pl. 411, 412. At this point I notice a form in 2 Chit. Pl. 281, for placing rubbish in a street, overturning carriage, and injuring plaintiff, using only the general language that plaintiff "was greatly hurt, bruised, cut and wounded and sick and sore." It is a case just analogous to this.

Another ground of demurrer is that the declaration alleges that the crossing over the street was uneven, sideling, muddy, rocky, and slippery, and there was a deep mudhole in it, and the crossing in bad order and condition, and out of repair, and no proper crossing had been made, and the street foundrous and covered with mud and water; and the contention is that the plaintiff saw, or could have seen, the danger, and in crossing was guilty of contributory negligence. I do not concur in this point of demurrer. It was essential that the declaration charge these things to maintain the action, and so stating does not bar the plaintiff of his action. It does not state that plaintiff knew its bad condition. And, even if one knows a street is in bad condition, he need not stay indoors, and he need not refrain

from crossing. It does not appear from the declaration that the defects were patent, and the danger obvious, so as to deter a prudent man from doing what everybody does—pass along streets even though not in proper condition. This declaration states these matters as basis of defendant's negligence. He does not admit his own contributory negligence, and any inference that might be drawn of it he need not negative. *Sheff v. Huntington*, 16 W. Va. 307.

The next question of the case is whether the defendant is liable upon the facts. And that depends upon whether the crossing was defective within the meaning of the statute (section 53, chapter 43, Code 1891) that "any person who sustains an injury by reason of a public road or bridge in a county, or by reason of a public road, bridge, street, sidewalk, or alley in an incorporated city, village or town, being out of repair may recover all damages sustained." When we are told, as in *Chapman v. Milton*, 31 W. Va. 384 (7 S. E. Rep. 22) and *Gibson v. City of Huntington*, 38 W. Va. 177 (18 S. E. Rep. 447) that the liability of cities and towns for injuries by reason of streets being out of repair is absolute, we must not be misled. It is meant that, when the basis or cause of the liability exists, that liability is absolute in the sense that no want of notice or other excuse for the defect in the street will exonerate the town. But this idea of absoluteness does not refer at all to the cause of liability, but only to the liability when it exists. It does not mean that the state of the street must be perfect. Before imposing this absolute liability, we must first determine whether the street is out of repair in the sense of the statute. When is it so out of repair? Is it to be absolutely free from stones, mud, or inequalities, like the floor of your own home, or like the paths, walks and drives in the grounds of a royal palace or beautiful park? Where shall we find this perfection? Is it to furnish absolute immunity from accident and injury? What city or town in the country might not be bankrupted if this is to be the construction of the statute? There is no city, however well ordered, complying with this standard. None could do so with the means at its command, short of confiscatory taxation. It is hard,

indeed impracticable, to define in advance, suitably for every case, just what the words "out of repair" here used do mean. About all that can be said by way of general rule is that cities, towns and villages are simply required to keep streets and sidewalks in a reasonably safe condition for persons traveling in the usual modes by day and night, and exercising ordinary care. Elliott, Roads & S. 448.

This Court has held against the doctrine of the highest state of repair by announcing the law to be that: "A municipal corporation is not an insurer against accidents upon streets and sidewalks. Nor is every defect therein, though it may cause the injury sued for, actionable. It is sufficient if the streets—which include sidewalks and bridges thereon—are in a reasonably safe condition for ordinary travel in the ordinary mode, by night as well as by day; and whether they are so or not is a practical question to be determined in each case by the particular circumstances." *Wilson v. City of Wheeling*, 19 W. Va. 323. Let it be understood once for all, under the principle long ago announced by this Court, and ample authority elsewhere, that the law does not require a municipal corporation to respond in damage for every accident that may be received upon a public street. The law does not require it to have its streets or sidewalks so constructed as to secure absolute immunity from danger in using them; nor is it bound to employ the utmost care and exertion to that end. 2 Dill. Mun. Corp. § 1006. Were it otherwise, what would be the burden cast upon taxpayers in this state, where heavy rains and snows constantly fall, freezes and thaws frequently come, which, with other causes, work great and constant injury to streets? Now let us look at the present case in the light of these principles.

The claim of the plaintiff is that on a December night he, in company with another, was walking along Princeton avenue, and crossing Bland street at its junction with the avenue, he stepped upon a stone, to keep out of the mud, and, it slipping from under him, he fell and broke his leg. There were two mudholes, as plaintiff's evidence tends to show, in the crossing—one very small, one of considerable

size and depth—and this rock was between them, two to three feet from one, and one foot from the other, people passing between them. The rock was eight or ten inches wide—as large as a spittoon. He could have passed between the rock and either mudhole, though it would have put him in mud, as a bright electric light sixty feet distant was giving light, and, besides, Yeager's companion had a lantern; and when they reached Bland street Yeager himself saw the situation, as he exclaimed, "Look out; here is a bad place." If disposed to be rigid, we might say that he should not have stepped on this rock, and thus have used the very thing he now says was a defect. But waive that. What is the particular point of defect causing the injury? Not alone the mudhole, as he avoided that. I suppose it is that the crossing was uneven and sideling, causing the rock to slip, and when he fell his legs went into the mudhole, increasing the force of the fall. This evidence adduced by the plaintiff was enough to go before the jury, as appreciably tending to sustain the action, and the motion of defendant to exclude it was correctly overruled. *Powell v. Love*, 36 W. Va. (14 S. E. Rep. 405). And yet it may be gravely questioned whether, tested by the plaintiff's evidence alone, the action is sustainable. But when we look at all the evidence we are led by the clear and decided weight and preponderance of it to say that the verdict is contrary to the evidence. We must look at and consider the evidence on both sides, including the evidence in conflict with that of the plaintiff. Code 1891, chapter 131, s. 9; *Johnson v. Burns*, 39 W. Va. 658 (20 S. E. Rep. 686).

The defense introduced thirteen witnesses whose evidence bears on the condition of the crossing, as against six for the plaintiff, and, so far as we can see from paper and positions of trust and business held by them in the community, their evidence is credible. We do not see that any question of veracity was made against them. The evidence shows that a couple of months before this accident there was a large mudhole in Bland street at its junction with Princeton avenue, and that limestone rock was hauled and thrown into it, and a crossing made clear across it, at least

eight feet wide, the work occupying three days with three teams and twelve men. The rock was broken to the size used in macadamization—about as large as an egg. It was level, and only sideling or inclined, to give drainage. There were no mudholes in the crossing when the accident took place. There was no such sized rock there as the plaintiff claimed; indeed, no rock. Men examined it that night and next morning, and no rock was seen. It was a good, solid crossing. Special labor and attention had been just used to make it so. The statute commands us to consider all the evidence, and, unless that consideration is a merely perfunctory one, we are compelled to say that this is the state of the case, decidedly, under the evidence. The evidence conflicts as to the presence of the mudhole and stone, the decided weight being with the defense. Muddy and slippery this crossing was. The true explanation of the accident is that the plaintiff, in making long steps or effort to get quickly across, and avoid or hasten through the mud, slipped. No doubt the mud there caused the slip. Had the crossing been free of it, likely the fall would not have occurred. Then the case narrows itself to the question, is the presence of this mud a defect under the statute? If so, what town of moderate size in the state would not be subject to action upon action? This mud was peculiarly slippery—"as slick as glass," both sides say; but that was owing to the peculiar character of the soil in those parts; as some witnesses say, it was an ocherous soil, and the slickest substance anywhere to be met. Princeton avenue and Bland street were not macadamized in this newly built town, and wagons would inevitably and constantly deposit from their wheels on this crossing quantities of this mud, as this crossing was very prominent in this business town. Did this make the road actionably defective? I say not. And this is the length and breadth of the city's offense, if we must say it arose from anything pertaining to the crossing, and not from an unaccountable accident, as several witnesses say it was. Any one is liable to fall in walking, especially at night, using the legs in effort to cross muddy places. It is charged by the town that the plaintiff was

drinking. I do not at all place the misfortune on that ground. I think it was simply an accident, or, if the city is chargeable, it is only because of the mud on the crossing. Is that enough to make it liable? Our state has great and often-recurring precipitation of rain and snow, especially in winter. Mud follows inevitably everywhere. No means at a town's command can prevent its presence in some quantity, even on crossings, and in small quantity it makes them slippery.

In applying this statute we can consider the location of the road, the nature and circumstances of the particular section, the difficulty of keeping it in high repair without unreasonable expense, the season of the year, and the nature and amount of travel. Ang. High. § 259. The mere slipperiness of a sidewalk occasioned by ice or snow—the same, certainly, as to mud—"not being accumulated so as to constitute an obstruction, is not ordinarily such a defect as will make the city liable for damages occasioned thereby. Where there is snow upon a sidewalk, there is danger from slipping and falling, even on the best constructed sidewalks." 2 Dill. Mun. Corp. § 1006. This mud's presence was not a structural defect, not an obstruction.

Being of opinion that the verdict is contrary to the evidence, we reverse the judgment, set aside the verdict, award a new trial, and remand.

CHARLESTON.

BIG SANDY NATIONAL BANK v. CHILTON *et al.*

Submitted January 15, 1894—Re-submitted on Rehearing January 15, 1895.—Decided April 13, 1895.

1. NEGOTIABLE NOTE—NOTICE OF PROTEST.

Where a negotiable note, indorsed by several parties, residing at different places, is made payable at a bank in the city of H., and before maturity it is discounted by a bank in the town of C., and by the last named bank it is indorsed to a bank in the city of H. for collection, and one of the indorsers resides in said city of H.

when said note matures and is presented for payment, and payment is refused, and the note is duly protested, the bank to which said note was indorsed for collection is only bound to give notice to the bank in C., its immediate indorser.

2. NEGOTIABLE NOTE—NOTICE OF PROTEST.

When notice has thus been given to said bank in the town of C., the duty devolves upon it to give notice of such protest to the prior indorsers, if he wishes to hold them as such.

3. NEGOTIABLE NOTE—NOTICE OF PROTEST.

Although one of said indorsers resides in the city of H., where said note was payable, said bank in the town of C. may send notice of such protest through the mail; and, if sent in due time, said indorser will be held, although he never receives the notice so sent.

4. NEGOTIABLE NOTE—NOTICE OF PROTEST.

Under the circumstances of this case, the indorser residing in the city of H., where said note was payable, is not entitled to personal service of the notice of such protest, although he resides in the city where said note was made payable.

SIMMS & ENSLOW for plaintiff in error, cited 3 Randolph Com. Paper 268, § 1240; 5 Mason (U. S. Cir. Ct. Rpt.) 366; 17 Wis. 157; 48 Mo. 66; 3 Dana (Ky.) 126; 3 Mackey 351; 3 Humph. (Tenn.) 670; 34 N. Y. 128; 1 Parsons on Notes & Bills 514, 578; 28 Ver. 316; 6 Mass. 316; 7 East 385; 7 Pa. St. 178.

CAMPBELL & HOLT for defendants in error:

Notice of protest must be personal, and not by mail, unless proven to have been received in due time, when the indorser lives in the same city or town where the note is payable.—2 Daniel on Nego. Ins., 1005, 1038, 1039; 6 How. 248; 2 Peters 96; Story on Bills, § 312; 15 Gratt. 501; 29 W. Va. 528; Parsons on Notes and Bills 511; 1 Am. L. Cases 390; 1 Ohio St. 266; 2 Rob. Pr. 190, 191, 197; 7 Bush (Ky.) 93.

Who are regarded as of the same place.—102 Mass. 177; 4 Humph. 86; 5 Metc. 212; 2 Hill 587; 10 Johns. 490; 11 Johns. 231; 6 Mart. 506; 6 How (Miss.) 609; 10 Neb. 338; Mart. and Yerg. 183; Edwards on Bills 602; 8 W. & S. p. 138; 4 Wash. C. C. Rep. 470.

ENGLISH, JUDGE:

On the 29th day of July, 1892, the Big Sandy National Bank brought an action of *assumpsit* in the Circuit Court of Cabell county against W. E. Chilton, M. B. Mullins, Thomas H. Harvey, Z. T. Vinson, J. C. Williamson, and W. H. Crum, on a certain negotiable note made by W. E. Chilton, dated January 13, 1891, whereby, three months after date, without grace, he promised to pay to order of M. B. Mullins, two thousand dollars, payable at the First National Bank of Huntington, value received, with interest from date, which note was indorsed by M. B. Mullins, Thomas H. Harvey, Z. T. Vinson, J. C. Williamson and W. H. Crum to the said Big Sandy National Bank.

The defendants Z. T. Vinson and T. H. Harvey plead *non-assumpsit*, and issue was joined thereon. The case was submitted to a jury, and resulted in a verdict for the defendants Z. T. Vinson and T. H. Harvey, and against the defendants M. B. Mullins and W. E. Chilton, for the sum of two thousand one hundred and sixty dollars and ninety four cents; and thereupon the plaintiff moved the court to set aside said verdict so far as it found for the defendants T. H. Harvey and Z. T. Vinson, and award it a new trial on the ground that so much of said verdict was contrary to the law and the evidence, and because the court misdirected the jury, which motion was overruled by the court and judgment was rendered in accordance with said verdict; and thereupon the plaintiff excepted to the rulings of the court, and tendered its bill of exceptions, which was signed, sealed and made a part of the record in the cause.

After the testimony in the case was concluded, the plaintiff asked the court to give the jury the following instruction: "The court instructs the jury that if they find from the evidence that the note sued on was duly presented at the counter of the bank at which it was payable on the day it was due, and payment demanded, at the close of banking hours, and payment was refused, and it was on the same day duly protested by the notary who presented it, and the

notices of protest were duly sent by the United States mail that day to the Big Sandy National Bank or M. H. Houston, the cashier thereof, and the cashier, Houston, on the same day he received the said notices, duly mailed them to T. H. Harvey and Z. T. Vinson, Huntington, W. Va. (their place of residence) and placed them so addressed in post-paid envelopes in the post office at Catlettsburg, Ky., then you should find for the plaintiff against the said T. H. Harvey and Z. T. Vinson." The defendants T. H. Harvey and Z. T. Vinson objected to said instruction, and the court sustained said objection, and refused to give said instruction, to which ruling the plaintiff excepted. The said defendants Harvey and Vinson asked the court to give the following instruction to the jury: "The court instructs the jury that if they find from the evidence in this case that the defendants T. H. Harvey and Z. T. Vinson were indorsers of the note in suit, and were resident in the same city or town where demand for the payment of said note was made, and if they further find from the evidence that no notice of protest was personally given to or left at the dwelling house or place of business of said indorsers, then said indorsers, Harvey and Vinson, are not liable, and the verdict of the jury must be for them." The plaintiff objected to the giving of said instruction to the jury. The court overruled said objection and gave said instruction, to which ruling the plaintiff again excepted; and thereupon the plaintiff applied for and obtained this writ of error.

The sole question presented for our consideration is whether the defendants T. H. Harvey and Z. T. Vinson were legally and properly served with notice of the protest of the note sued upon, so as to bind them as endorsers of the same.

The facts in regard to the protest and notice are as follows: On the day said note matured, it was presented at the counter of the First National Bank of Huntington, and payment thereof was demanded, and, being refused, it was protested by E. B. Enslow, a notary public, who prepared notices of the protest, inclosed them all in one envelope, and mailed them to the cashier of the Big Sandy National Bank

at Catlettsburg, Ky., which bank was the owner and holder of said note, on the 13th of April, 1891, at 6 o'clock p. m., which notices were received by said cashier the next morning after the protest, and were mailed by him on the same day to Thomas H. Harvey and Z. T. Vinson, directed to Huntington, W. Va., but were never received by them.

In considering the questions presented in this record, I shall first inquire what are the duties of a bank to which a negotiable note is endorsed by the holder for collection with reference to said note when the same matures. Daniel on Negotiable Instruments (volume 1, § 331) says: "Sometimes a bank holding endorsed paper for collection sends notice in the event of its dishonor to the endorser from whom it was received. Sometimes it sends notices, not only to him, but also to the drawer and to all the indorsers, addressed to their post offices, or delivered at their places of business, respectively. Sometimes it incloses notices for all the parties entitled thereto under one envelope, in company with notice to the last endorser, that he may thus be conveniently supplied with the means of transmitting notice to the successive indorsers, and to the drawer antecedent to him, if such there be. But how far the duty of the bank extends in this regard, and what it must do to discharge itself of liability, is a question upon which opinion has divided. The weight of authority, however, is strongly to the effect, and the law may be assumed to be, that it is only necessary for the bank to notify its immediate predecessor—that is, the party from whom it received the paper—no matter what may be the nature of the title or interest of that party to or in it." So it was held in the case of *Phipps v. Bank 8 Metc.* (Mass.) 79, that "a bank that receives from another bank for collection a note indorsed by the cashier of that bank is bound to present it to the maker for payment at maturity, and, if it is not paid to give notice of non-payment to the bank from which the note was received; but it is not bound, unless by special agreement, to give such notice to the other parties to the note." Edwards on Bills and Notes (volume 2, § 834) says: "The holder should give notice of dishonor to all the parties to whom he intends to look for

payment, but it is enough for him to send or give due notice to his indorsers for the purpose of charging the party indorsing the bill over to him, and it is the business of each indorser to take care that the party responsible to him is duly notified." Again, in the case of *Bank v. Goddard*, 5 Mason 366, Fed. Cas. No. 917, it was held that "where a note is made payable at a particular place, and the indorser resides there, if the holder remits it to his agent at such place for payment, and it is dishonored, the agent is not bound to give notice of the dishonor to the indorser, but his duty is to give notice to his principal, who may then give notice to the endorser, and, if given in due time after the principal has received notice, the indorser is bound." In the case of *Phipps v. Bank*, *supra*, the court in speaking of the case of *Bank v. Goddard*, says: "The case was thoroughly argued, and an elaborate opinion given by the learned judge of the Circuit Court of the United States, in favor of the plaintiffs, that the agent was not bound to give notice of dishonor to the indorser, even though living in the same place, but only to his principal." In the case of *Howard v. Ives*, 1 Hill 203, "where H., an indorsee of a bill of exchange, indorsed it to a bank for the mere purpose of collection, and the notary employed by the bank transmitted notice of protest by mail to H. on the next business day after presentment, *etc.*, who on the next day after receiving it mailed notice to his indorser, held sufficient to fix the liability of the latter, though, had the notice been sent directly to him, he would have received it sooner; and this *semble* whether the notary be regarded as H.'s agent or that of the bank." We also find it held in the case of *Mead v. Engs*, 5 Cow. 303, that "one to whom a bill or note is endorsed merely as agent to collect (e. g. a bank) is a holder for the purpose of giving and receiving notice of non-payment; and he is not bound to give notice of non-payment directly to all prior parties, but may notice his next immediate indorser, who is bound to notice his indorser, *etc.*, in the same manner as if the bill or note had been negotiated for a valuable consideration." And in this connection attention may be called to the fact that the Bank of Huntington is not a party defendant to this suit,

and no effort is made in the case to fix responsibility upon it or to obtain judgment against it. And, again in the case of *Philippe v. Harberlee*, 45 Ala. 597, it was held that "notice of the protest of a note or bill of exchange may be given to an indorser through the post office, notwithstanding the place where payment was to be made, and where the demand and protest were made, was that of his residence, when the holder, who is the owner, lives elsewhere." And upon this question, in New York, in the case of *State Bank of Troy v. Bank of the Capitol*, 41 Barb. 343, it was held that "in the case of a bill or note sent to a bank as agent for collection merely, in the absence of an express contract or of commercial usage, it is not obligatory on the collecting bank to notify and duly charge all the prior parties to the paper, but only its own principal or immediate indorser." And, upon this question, see *Bank v. Smith*, 132 Mass. 227 and *Spencer v. Ballou*, 18 N. Y. 327; 3 Rand. Com. Paper, §§ 1240, 1241. In section 1240 it is said: "Notice may be transmitted from one indorser to another, and so back to the drawer of the bill, however circuitous the manner of giving notice may be. And such a notice is sufficient, although the holder and the remote party may live in the same town." And in section 1241 the law is stated to be that "an agent for collection is only required to give notice of dishonor to his principal." And in 2 How. 66, it is held, in *Burke v. McKay*: "Neither is it a necessary part of the official duty of a notary to give notice to the indorser of the dishonor of a promissory note."

Now, the evidence in the case under consideration shows that the note in controversy was discounted by the Big Sandy National Bank of Catlettsburg, Ky.; that it was presented there by W. H. Crum, who got the money on it; that said bank sent said note to the bank of Huntington for presentment; that the defendant Z. T. Vinson was a resident of the city of Huntington; and that T. H. Harvey resided near the city of Huntington, W. Va., and received his mail at that place. When said note had been presented, on the day of its maturity, at the first National Bank of Huntington, and payment had been refused, said note was duly protested, as above stated, and notices sent to the Big Sandy

National Bank; and, the same day said notices were received, they were placed in separate envelopes, properly stamped, and directed, one to Z. T. Vinson, and another to T. H. Harvey, at Huntington, W. Va.; and they state in their testimony that they never received either of said notices. It is true that the cashier of the Big Sandy National Bank is uncertain as to the date when he received said notices, and says that it may have been the 17th or 18th of April. The protest was on the 13th of April, 1891, but he states on cross-examination that he received them the next morning after the note was protested, and that he mailed the notices of protest to said Harvey and Vinson on the same morning.

Under this state of facts, did the Circuit Court err in refusing to give the instruction asked for by the plaintiff, and in giving the instruction asked for by the defendants, both of which are set forth above, and present in a few words the true controversy in the case? The defendants Harvey and Vinson contend that under the circumstances, unless notice of protest was personally given to them, or left at their dwelling house or place of business, they were released from their liability as indorsers of said note; while the plaintiff, on the other hand, contends that it had a right to send the notice of protest as it did through the mail, and thereby hold them as indorsers, whether they received them or not.

Parsons, in his work on Mercantile Law, at page 115, says: "Each party receiving notice has a day or until the next post after the day in which he receives it before he is obliged to send the notice forward. Thus, a banker with whom the paper is deposited for collection is considered a holder, and entitled to a day to give notice to the depositor, who then has a day for his notice to antecedent parties." Now, while it is true that a bank to which a note is indorsed for collection is such a holder that it may give notice to all prior indorsers upon the note, yet, as we have seen, it is not bound so to do. All that is required of such bank is to give notice to its immediate indorser; and in this instance the indorser to whom the Bank of Huntington was bound to give notice did not reside at Huntington, but at Catlettsburg, Ky.

Therefore the notice could be given through the mail. When the bank at Catlettsburg received such notice, then the duty devolved upon it to notice the prior indorsers if it wished to hold them, which it did by placing notices in the mail the same day on which it received notice, to wit, the next day after the protest; and, if said bank had the right to do this, it bound said Vinson and Harvey, whether they received the notices or not. In 2 Rob. Prac. (New) at page 192, we find it stated that "it has been held by the Supreme Court of Pennsylvania and by the Supreme Court of the United States that notice to a party put into the post office of the town wherein the presentment and demand are made will be sufficient when he lives beyond the limits of the town, and it may be directed to him at that town if its post office be the nearest to his residence, and that at which his letters are received;" citing *Bank v. Lawrence*, 1 Pet. 580; *Jones v. Lewis*, 8 Watts & S. 14.

In the case we are considering, the indorser Harvey did not reside in the city of Huntington, but received his mail at Huntington. The indorser Vinson, however, did reside in the city of Huntington, and the question is whether, so residing, he was entitled to personal service of notice; and, if there was any party in the city of Huntington who was bound to give him notice of the dishonor of said note, he, perhaps, would be entitled to personal service, either at his residence or place of business, although in the case of *Boyd's Adm'r v. City Sav. Bank*, 15 Gratt. 501, it was held that where "an indorser of a negotiable note dies intestate before it falls due, and, when it falls due, it is regularly protested for non-payment, and, no person having then qualified as administrator on the estate of the indorser, the notary on the same day deposits in the post office at Lynchburg, where the note had been made payable and discounted, the notice of protest, directed to the 'legal representative' of the indorser, Lynchburg, the indorser having lived in that place, and his family still living in the same house, the notice is sufficient." Moncure, Judge, in delivering the opinion of the court in that case said: "While it has been long and

well settled that, if the parties to give and receive notice reside in different places, the notice may be sent by mail, so in the other it seems to be well settled, at least as a general rule, that, if they reside in the same place, the notice must be personal; that is, must be given to the individual, or left at his domicile or place of business"—citing 1 Am. Lead. Cas. (4th Ed.) 396 and notes, and 2 Rob. Prac. (New) 191. But of late the courts have strongly inclined to restrict the general rule referred to, and have established many exceptions to it, as may be seen by referring to the case of *Bank v. Lawrence*, 1 Pet. 578, cited in 1 Am. Lead. Cas. 402, 403, and the notes. The law is stated thus in the case of *Linn v. Horton*, 17 Wis. 157: "The holder of a bill or note may rely, if he chooses, on the responsibility of his immediate indorser, and need not give notice of protest for non-acceptance or non-payment to any previous party." And in the case of *Griffith v. Assman*, 48 Mo. 66, that court held that, "when the notary making a protest knows the residence of all the indorsers, he may at once send the notice of protest to each one individually, when they will be holden in the order of their indorsements. But the holder is not supposed to know any of the parties except the one who has endorsed the paper to him, and each one is supposed to know the one from whom he has received it. The contract is direct, and the relation is immediate between each indorser and his immediate indorsee, and the notice is sufficient if it comes to each indorser from such indorsee as soon as he is advised of the protest. Nor does the rule vary although the parties live in different cities. The holder is only required to notify the one who indorsed to him, unless he desires to hold other parties who might escape responsibility if not notified in their town. Nor is there any difference if the last indorsement is for collection only."

In the case we are considering, the last indorsement was for collection only, and notice was given to the Big Sandy National Bank, that indorsed said note for collection, on the same day the note was protested. Story on Bills of Exchange (section 294) says: "Where there are numerous parties in succession on the bill as drawers or indorsers, who

are entitled to notice, and may, as drawers or indorsers, be liable on the dishonor of the bill, not only to the holder, but to any intermediate indorser standing between him and themselves, it is apparent that, as each of such successive parties is entitled to a full day to give notice to any antecedent party in the bill, several days may elapse without any *laches* in any party, between the time of the dishonor and the time of notice thereof to the drawer or the other early indorsers. Nay, this may occur in respect to parties all of whom reside in the same town; and yet if the notice is communicated to them in regular succession, making an allowance of one day for each party who receives notice to give notice to the antecedent parties, they will all be held liable, and the notice be deemed sufficient to bind them." In this connection I refer also the case of *Bank v. Taylor*, 34 N. Y. 128, where it is held that, "the whole duty of a holder of a protested bill is discharged by notice to his immediate indorser, and all parties to the bill or note will be charged if they receive notice in due course from their immediate subsequent indorsers. When the collecting agent of the holder resides in the same city with one of the indorsers, it does not modify the rule as above stated." The opinion of the court in this case was well considered, and, in concluding, the following language is used: "The text writers and all the authorities I have examined concur in the doctrine that the whole duty of the holder is discharged by notice to his immediate preceding indorser, and that all prior indorsers are fixed if they receive reasonable notice of the dishonor of the bill or note from their immediate prior indorser. These rules have long been settled and familiar to those dealing in notes and bills of exchange. It is of the utmost importance that rules of this character when once promulgated should be adhered to, and we are not at liberty to part from them if we would. I find no case where an exception has been made by reason of the circumstance that an intermediate indorser is a resident of the same town, city or village with the holder. If he is not the immediate prior indorser of the holder at the time of protest, the whole duty of the holder is discharged by the notice to his immediate indorser,

and all parties to the bill or note will be charged if they receive notices in due course from their immediate subsequent indorsers." See *Bank v. Taylor*, 7 Bosw. 466, where this question is carefully considered and numerous authorities cited; also, 34 N. Y. 128, where the last named case was affirmed on appeal. See, also, the case of *Hill v. Bank*, 3 Humph. 670, in which it appears that "an agent resident in New Orleans, to whom a bill was indorsed for collection, and which was protested for non-acceptance, gave notice to the principal, resident at Nashville, and the principal thereupon gave notice to the indorser, resident at New Orleans; held, that this notice was good."

In the case at bar the evidence shows that the notices to Harvey and Vinson were in due time placed in prepaid envelopes and delivered in the post office at Catlettsburg, a town about twelve miles from Huntington, between which towns the mail is carried twice a day. On this point, Parsons on Bills and Notes (page 478) says: "In other words, the sender is bound to use due diligence; and on this point it is sufficient diligence if the letter be put into the regular post office, for it can not be asked of any sender that he should have any oversight of or interference with the public service of the post office; and therefore he is held to no liability for accident there, however it may happen"—citing numerous cases in note. Now, it is true that in the case of *Insurance Co. v. Wilson*, 29 W. Va. 528 (2 S. E. Rep. 888) Woods, Judge, in delivering the opinion of the Court, on page 546, 29 W. Va. and page 888, 2 S. E. Rep., says: "When a negotiable note is dishonored, it is the duty of the holder to give immediate notice of such dishonor to the indorser;" and that, "when the indorser resided in the same town where the demand is made, the notice must be personal, or left at his dwelling house, or place of business." And the same is held, in substance in the case of *Bowling v. Harrison*, 6 How. 248. It is there held that, "where the holder of a protested note and the party entitled to notice reside in the same city or town, notice should be given to the party entitled to it, either verbally or in writing, or a written notice must be left at his dwelling house or place of business." A party,

however, to be entitled to such notice, must be one to whom the holder residing in such city or town was bound to give notice; and in the case of *Insurance Co. v. Wilson, supra*, speaking of the mode of service upon an indorser, what indorser is intended and referred to? Surely, it was and is intended that the indorser to be so personally served with notice is the one that the holder was bound to serve notice upon; but, as we have seen, the Bank of Huntington, which was the holder in the city of Huntington, which held the note by indorsement from the Big Sandy National Bank for the purpose of collection, was not bound to serve notice upon either Harvey or Vinson, but was only bound to give notice to its immediate indorser, the Big Sandy National Bank; and, when that was done, its whole duty with reference to said note was performed, and the duty then devolved upon the Big Sandy National Bank to give notice to the prior indorsers in due time, if it wished to hold them. This last named bank was the holder for value, the real owner of the note, having discounted it; and when it undertook to give notice to the prior indorsers, and among them Harvey and Vinson, residing in a different town from the location of said bank, all that was required of it was to properly mail such notice in due time, directed to said Harvey and Vinson, respectively, addressed to each of them at Huntington, where they receive their mail; and, having done this, said indorsers would not be released as such, although the notice was never received.

In the case of *Bowling v. Harrison, supra*, it is also held that the term "holder" includes the bank at which the note is payable and the notary who may hold the note as the agent of the owner for the purpose of making demand and protest. In this case the note was sent, as is the almost uniform custom, to the bank at which it was payable for collection; and, as we have seen, the bank to which a note is thus sent is a holder to such an extent that it may give notice to the indorsers; and, if it undertake to do so, an indorser residing in the same city or town is entitled to personal service, but it is not bound to give such notice, and, as I think the weight of authority shows, it is only bound

to give notice to its immediate indorser, and, if such indorser wishes to give notice to prior indorsers, he may do so through the mail if such indorser resides at a different place, even though such indorser may reside in the same town in which the bank is located to which it was sent for collection; and, as to the duty of the notary, in the case of *Burke v. McKay*, 2 How. 66, it is held that "it is not a necessary part of the official duty of a notary to give notice to the indorser of the dishonor of a promissory note."

I therefore think that the Circuit Court erred in rejecting the instruction asked for by the plaintiff, and in giving the instruction asked for by the defendants, and in rendering the judgment complained of, releasing and exonerating said Harvey and Vinson as indorsers upon said note. The judgment complained of is therefore reversed as far as it exonerates said Harvey and Vinson from liability as indorsers upon said note, and the verdict of the jury is set aside so far as it finds, for the defendants T. H. Harvey and Z. T. Vinson. A new trial is awarded as to them, and the case is remanded to the Circuit Court of Cabell county, for further proceedings to be had therein, with costs to the plaintiff in error.

ON REHEARING.

This cause was submitted at the January term, 1894, and the foregoing opinion was handed down at the spring special term, 1894, and a rehearing was then awarded, since which time no additional brief or argument has been submitted by the defendants in error. A brief, however, has been filed by the plaintiff in error; and although I have carefully gone over the case and the authorities cited, and to which I have had access, I see no cause to alter my opinion. The true rule as it appears to me is stated in *Bank v. Taylor*, 7 Bosw. 466, where it is held that "there is no rule requiring that the indorser residing in the same town as the acceptor shall be notified the next day after the presentment, where the banker at whose instance the bill is protested, and to whom notices of protest are sent, does not reside in said town. It is enough to charge him that the true owner mails

notice to him by the first mail of the day next after that on which he in due course receives notice of dishonor, such owner and indorser residing in different towns." That case was taken to the Court of Appeals of New York, and the report of the result is found in 34 N. Y. 128, where it is held: "The whole duty of the holder of a protested bill is discharged by notice to his immediate indorser, and all parties to the bill or note will be charged if they receive notice in due course from their immediate subsequent indorsers. When the collecting agent of the holder resides in the same city with one of the indorsers of the bill, it does not modify the rule as above stated." In the case of *Bowling v. Harrison*, 6 How. 248, if the Planters' Bank of Vicksburg had sent notice of protest to Bowling, who resided in Maryland, which it had a perfect right to do, it would then have done all that was required of it to hold Bowling and relieve itself from responsibility, and then Bowling would have had a perfect right to send notice through the mail to Harrison at Vicksburg; but the bank having elected to serve the notice directly upon Harrison, the indorser, who resided in the same city, service had to be made personally. My conclusion is that the judgment of the Circuit Court must be reversed so far as it exonerates said Harvey and Vinson from liability as indorsers upon said note; the verdict of the jury must be set aside so far as it finds for the defendants T. H. Harvey and Z. T. Vinson. A new trial is awarded as to them, and the cause is remanded to the Circuit Court of Cabell county, for further proceedings to be had therein, with costs to the plaintiff in error.

BRANNON, JUDGE:

On first impression I was of opinion last term that the judgment discharging Harvey and Vinson was right, but further reflection and examination have brought me to the same conclusion announced by Judge English.

Point 13 of the Syllabus in *Insurance Co. v. Wilson*, 29 W. Va. 528 (2 S. E. Rep. 888), correctly states the rule

as it was before section 8, chapter 99, Code, was amended by chapter 4, Acts 1891, so as to read as found in the edition of 1891 of our Code. Said point says: "Where the indorser resides in the same city or town where the demand of payment is made, the notice to the indorser must be personal, or left at his dwelling house or place of business." But which indorser is here meant? Does it mean that if any one of several indorsers, immediate or remote, lives in the town where the demand of payment is made, he must be given personal notice? Or does it only mean that, if the immediate indorser live there, he must have personal notice? That depends on whether the collecting bank must notify all or only its immediate indorser. Some banks notify all; some, only the party sending the note. 1 Daniel, Neg. Inst. § 331. Some authorities hold that the collecting bank must notify all indorsers, so as to hold all bound; some other authorities hold that notice given by the collecting bank to its principal in time to enable him to give reasonable notice to those to whom he intends to look is sufficient, the bank being regarded as the real holder so far as giving and receiving notice is concerned. *Id.*; note in *Allen v. Bank*, 34 Am. Dec. 311. I think that the bank, to discharge itself from liability, need only give timely notice to its indorser, and that if that indorser give, within the time allowed by law, notice to the prior indorser, he is bound. Judge Moncure properly says: "While, on the one hand, it has been long and well settled that, if the parties to give and receive notice reside in different places, the notice may be sent by mail. So, on the other, it seems to be well settled, at least as a general rule, that, if they reside in the same place, the notice must be personal." *Boyd's Adm'r v. City Sav. Bank*, 15 Gratt. 505. Who are the parties to give and receive notice? is the question. I have with some hesitation concluded that, to start out, the collecting bank is a holder for this purpose. It gives notice to him who indorsed the note to it. If that indorser live in the same town with the bank, the notice must be personal; if he does not live there, notice may be sent by mail; and, though a remote indorser may live in the place

where the bank is, that does not require the bank to give him notice, personal or otherwise. *Bank v. Taylor*, 34 N. Y. 128. If it does give notice to him it ought to be personal. *Ramson v. Mack*, 38 Am. Dec. 610. This is because the law only required the bank to give notice to its indorser. When the bank gives its immediate indorser notice, he has a certain time to give notice to the party who indorsed the note to him, by personal service, if living in the same town, or, if not, he may use the mail. So on through the line of indorsement. Thus, the place of common residence shifts with each indorsement. One who is an indorser to another is the person to receive notice, and the other is the one to give notice; and in the next step he who received this notice becomes the one who is to give notice to some one who indorsed it to him.

In this case the Bank of Huntington was holder, and gave notice to the Catlettsburg bank by mail, as it resided in another town. And the Catlettsburg bank must give notice to Crum by personal service, if living in Catlettsburg, otherwise by mail; and so on through the line of indorsements. Any one in the line has right, being a holder entitled to look to all precedent indorsers, to give notice to all of them, giving personal notice or by mail, according as they live in the same town or not. Whether personal notice or by mail shall be given is according to whether the particular party required to give notice lives in the same town with the one to whom the notice is to be given. If he undertakes to notify all, he must conform to this. The law says that he who is to give notice must give personal notice to a person residing in the same town with him. That does not mean some one living in the same town who is an indorser, but not indorser to the person giving notice. If that indorser is not notified according to law, he is released, and therefore any holder ought to have a right to notify all prior indorsers, by notice proper, according as it is between him and them; but if he notifies only his indorser, trusting that his indorser will notify his own indorser so as to hold him, he need not give personal service to any one but his own indorser living in his own town; and having done this, if his

indorser gives notice, proper as between himself and his immediate indorser, the latter is bound to any holder subsequent. It is only a question of notice of a fact—that is, non-payment; and, come from whom it may, unless a stranger, it is enough. See *Bank v. Taylor*, 34 N. Y. 128.

If the above be true, if A. make a note to B., resident at Charleston, payable at a Charleston bank, and B. indorse to C., of New York, and C. indorse it to D., of Melbourne, and D. sent it to the Charleston bank for collection, notice of dishonor need not be given to B., though living at Charleston, but to D., of Melbourne; and if he, in due time after receiving notice, send notice by mail to C. at New York, and then C., in due time send notice to B., at Charleston, by mail, B. will be bound, though he get notice months after non-payment. This consideration largely induced me to the first opinion entertained—that personal notice from the bank, or its agent, the notary, must be given at once to B., because living at Charleston; but it seems that, while it may be so, it need not. The many cases relating to this subject are calculated to confuse and mislead, especially the generality of the language that, when the indorser lives in the same town, he must have personal notice. The change by the act of 1891, dispensing with the necessity of personal notice of non-payment, renders the matter of little importance, save as to cases before its passage.

CHARLESTON.

CROFT v. HANOVER FIRE INSURANCE Co. *et al.*

Submitted January 28, 1895—Decided April 13, 1895.

1. INSURANCE — ORAL EXECUTORY CONTRACT — STATUTE OF FRAUDS.

An oral executory contract for fire insurance is valid, the statute of frauds not applying to it.

40	508
49	440
49	441
40	508
55	354

2. INSURANCE—ORAL CONTRACT—EQUITY JURISDICTION.

If an oral contract for fire insurance has been made, and before the issuance of the policy the property is destroyed by fire, equity has jurisdiction to compel payment of the indemnity.

3. INSURANCE—MISTAKE AS TO TERM.

Though the assured understands the term to be covered by the insurance to be one year, and the agent of the insurance company understands it to be three years, costing in either case the same premium, this does not render the contract incomplete, so as not to warrant recovery for loss by fire occurring within one year.

4. INSURANCE—AUTHORITY OF AGENT.

Where an agent represents several insurance companies, and is intrusted with blank policies, signed by the officers, with authority to negotiate policies and issue them without referring them to the companies, and it is agreed by the insured that the agent shall place the risk in such company as he selects, and he does place it with a company, as shown by a memorandum made by him, the agreement is binding upon the company.

5. INSURANCE—AMOUNT OF POLICY.

Where, by agreement between the insured and the agent, the agent is to fix such amount of indemnity as he sees proper, and he does fix it, as shown by a memorandum made by him, the oral agreement is binding on the company.

6. INSURANCE—PAYMENT OF PREMIUM.

An agent of an insurance company authorized to negotiate risks may give credit in such executory agreement for the premium.

7. INSURANCE—PAYMENT OF PREMIUM.

Unless in such agreement pre-payment is made a condition precedent, the premium need not be paid until the policy agreed upon is ready to be delivered.

8. INSURANCE—MISTAKE AS TO INSURED—CORRECTION IN EQUITY.

The agent, by mistake, entered in his memorandum the name of the wrong person as the assured. This will be corrected in a suit in equity on such executory oral agreement, and the person who owns the property insured and who negotiated the insurance may recover in his own name.

HUTCHINSON, HUTCHINSON & CAMDEN for appellants:

In any action or suit founded upon contract, every averment setting forth the date and terms of the contract is an allegation of matter of essential description, and must be proven with a degree of strictness extending to literal precision.—Greenl. on Ev. vol. 1, part 2, chap. 2, §§ 56-58; 3 W. Va. 285; Idem, 556; 8 W. Va. 568.

To constitute a valid contract to insure against loss by fire,

the minds of the parties must meet as to the premises to be insured, and the risk, as to the amount of the policy, the date it should begin, and the time for which it should run; and as to the premium to be paid.—28 New York 153; 94 U. S. 629; May on Insurance, vol. 1, § 50.

The application for insurance must be accepted as made, and any departure from it, unless subsequently approved by the applicant, is fatal.—23 Wall. 85.

Where an agent acts for several insurance companies, and no particular company is named in the negotiations for insurance, or fixed by prior dealings, the contract is not complete.—65 Wis. 436; 20 Fla. 815; 50 N. Y. 402.

Where the issue is whether the acts of an agent amount to a preliminary contract to insure, declarations of the agent, not made while negotiating the insurance in question, to the effect that what he has done was sufficient, in his opinion, to bind the company, are not competent evidence of the fact as against his principals.—28 N. Y. 159, 160.

In order to have specific performance of a contract, the contract must be established, by competent proofs, to be clear, definite and unequivocal in all its terms. If the terms of the contract are not made out by satisfactory proofs, or if a new term would have to be introduced, specific performance will not be decreed.—23 Gratt. 595; 68 N. Y. 192.

W. G. PETERKIN for appellee :

1. *Contract to insure may be by parol.*—94 U. S. 594; Wood on Fire Ins., § 4; May on Ins., § 22; 20 Wall. 560; 19 How. 313.
2. *Agreement to insure distinguished from policy of insurance.*—May, § 45.
3. *Contract was complete on Sept. 13, 1891, when all the terms were settled, and nothing remained to be done, but to write the policy and pay the premium.*—May, § 43a.
4. *It is not necessary for applicant for insurance to name company.*—May § 58, § 59 (end); 123 Mass. 324.
5. *Prepayment of premium not necessary to constitute valid insurance contract.*—Wood § 30; 21 Am. St. Rep. 883, note; 20 Wall. 560; 31 Gratt. 362.

6. *Mistake as to name of insured is immaterial, and can not impair right to recovery.*—May, § 566a; Wood § 294; 28 W. Va. 583; 33 W. Va. 526; 37 W. Va. 283; 8 A. M. Rep. 150; 136 U. S. 287; 98 U. S. 85.
7. *Court of equity has jurisdiction to decree payment.*—Wood, § 12; May § 565; 31 Gratt. 365; 9 How. 390; 19 How. 313; 20 Wall. 560.
8. *Decree of court below is presumed to be according to the law and the truth of the case until the contrary is made manifest.*—Beach Mod. Eq. Prac. § 972; 2 Black, 581; 16 W. Va. 685, 713.
9. *If upon examination of whole record decree appears to be substantially correct, it should be affirmed.*—Bart's Chan. Prac. 2, § 374, p. 1139; Minor's Inst. Vol. 4, pt. 1. p. 870 [3d edition p. 1077-8] and cases cited.
10. *Decree for specific performance reviewed only if it appears to have been rendered in disregard of some well established principle of law or equity.*—2 Beach, § 979, quoting 14 Ves. 585; 55 Fed. Rep. 190, 203.
11. *All facts not expressly found are presumed to have been found in support of judgment.*—29 Pac. Rep., 403; 3 Am. St. Rep. 738.

VAN WINKLE & AMBLER for appellee :

1. *Remedy in this case is in equity.*—May on Ins. § 565; 31 Gratt. 362; 94 U. S. 651.
2. *Where agent of several companies designates any, he binds the one or more designated.*—May on Ins. sec. 43 A. 58-9; Wood on Ins. sec. 26-9; 123 Mass. 324.
3. *Premium may be on credit, as in* 94 U. S. 627; 20 Wall. 560; 136 U. S. 292; 10 W. Va. 589.
4. *No mistake in name by agent can avoid company's liability.*—28 W. Va. 583; 98 U. S. at p. 91-2; 31 W. Va. 851; 33 W. Va. 526; 25 Amer. State Rep. 908; 37 W. Va. 272.
5. *Every essential element agreed on.*—Wood on Ins. 294 and cases above.
6. *Tender dispensed with.*—18 W. Va. 320.

7. *Any view of period, covered date of fire. Plaintiff may accept one year, though entitled to three.*—30 W. Va. 335; 19 W. Va. 240.

BRANNON, JUDGE:

This was a suit in equity in the Circuit Court of Wood county by Walter L. Croft against the Hanover Fire Insurance Company and the Citizens' Fire Insurance Company for the specific performance of an agreement to issue a policy of insurance upon a dwelling house, which was consumed by fire. The court decreed that the insurance companies pay the insurance stipulated for, and the companies appeal.

No policy was actually issued, but the suit is based on an oral contract to insure and to issue a policy accordingly. As the "Statutes of Frauds and Perjuries," so called (Code, c. 98) does not apply to insurance, an agreement to insure need not be in writing. Wood, Ins. § 4; May, Ins. § 14; *Insurance Co. v. Colt*, 20 Wall. 560. I do not think clause 7 of chapter 98 of the Code applies to the case, even if the policy agreed upon was for three years. *Kimmons v. Oldham*, 27 W. Va. 258.

When a contract for insurance has been made, but no policy to evidence it has been issued, the remedy of the insured, after loss, may be by bill in equity, on the principle of specific performance; and the court does not simply decree the specific performance of the agreement by the actual execution of a policy of insurance, and then compel the insured to bring an action on that policy, but, to avoid multiplicity of actions and delay, having the parties before it properly for specific performance, will at once decree the payment of the amount which would be recoverable under the policy if issued, agreeably to that principle of equity practice that as all the necessary parties are before the court for one purpose, it will give full and complete relief, and not send them to another court. *Woody v. Insurance Co.*, 31 Gratt. 362; May, Ins. § 565; Wood, Ins. §§ 11, 12; *Insurance Co. v. Colt*, 20 Wall. 560. Or he may sue at law, by same authorities.

But the defendant companies say there was no contract

to sustain a suit, because the contract was vague, uncertain and incomplete. Herein lies the turning point of the case. As to proof, there is nothing peculiar in contracts of insurance. As in other cases, the contract must be definite and certain, and the parties must have agreed upon all essential terms. The contract must be such as to bind both parties—the one to insure, the other to pay the premium. All elements must be agreed upon, and if anything is left open or undetermined, so that the minds of the parties have not met, no contract exists, and there is no liability for a loss; as, where the rate of premium is left undetermined, or the time when the policy shall attach, or the apportionment of the risk has not been agreed upon, or the insured retains control over the premium note or any papers the delivery of which is a condition precedent, or if anything remains to be done by the insured as a condition precedent, as the payment of premium, or if the duration of the risk is not agreed upon, or any condition precedent has not been complied with. The *aggregatio mentium* (union of minds) must be fully established, and nothing must remain to be done but deliver the policy. The details of the contract must be fixed, and, if the agreement or understanding of the parties in reference thereto is not mutual—that is, if one party understands the matter one way, the other another—the minds of the parties have not met, and there is no contract in law or equity. Of course, the burden of proof to show such a contract as is enforceable is on the plaintiff. Wood, Ins. § 6.

The chief point of question in the contract, as it seems to me, is as to the length of time the policy was to run. It has been stated above that this is an essential element in a valid contract. The parties must agree upon a time for the duration of the policy. The plaintiff says that he applied for a policy on his dwelling house for one year, and understood that the agreement with the agents was for one year. One of the agents says he understood it to be three years. The agent says he made no memorandum in writing on this occasion. According to the evidence on both sides, in that interim an agreement was made for the insurance of the dwelling house in such sum as the agents

should fix, at a certain rate, and the policy was to be made out and sent by mail to the insured, and he was then to pay the premium, or it was to be charged to his father, who had other insurance with these agents, as the agents preferred. The agents agreed and promised to send the policy. They had policies in blank, signed by the officers, and they had authority to fill out and deliver them without application to the chief officers of the companies.

About one month after this, a brother of the plaintiff, by authority of his brother, met the one of the agents who had negotiated for the policy, and asked the agent for it, and was told that it had not been made out, as he had not satisfied himself as to the amount for which the policy should be written. The plaintiff's brother told the agent he wished it fixed up, and the agent himself says that he told the brother that he would fix it then as far as he could, as he was on his way to the train to go on a trip, but would attend to it; and he then wrote in a private memorandum book this memorandum: "W. M. Croft, \$600.00 on one-story fr. shingle roof dwell., near Davisville, 1½—3 yrs. N. Y. Underwriters." The brother told him to send the policy, and he would send the money to pay the premium, to which the agent assented. The evidence shows the agent agreed to credit; did not demand prepayment. It is not claimed otherwise.

About a month after this interview between this agent and the plaintiff's brother, the house was destroyed by fire, and this brother, the next day, called on the agents, and asked for the policy. The agent said he had written it, but had mislaid it, and searched and could not find it, and said he would look for it, and to call later, and then the brother informed him of the fire. In the afternoon the brother called again for the policy, but the agent had not found it. Later this agent concluded he had never written it up. After this the plaintiff tendered the agent the premium money, but he declined it, saying that he had informed the company of the fire, and the adjuster would soon come, and, "under the circumstances," he would not take the money.

We can say from the evidence on both sides that an agreement to insure was made, and nothing remained to be done but to issue the policy, and that the agent promised to do this. All the elements were settled, except as to time to be covered by the policy, let us say. The property was named. The plaintiff gave its value. The amount of the indemnity was left by the plaintiff absolutely to the decision of the agent. He would have right to fix that anyhow. It was with him to say just how much he would insure it for. He did fix it, as the memorandum shows. The rate of premium was fixed. The discretion to select the company was left to the agent. The agent, as a witness, says it was only through his neglect or forgetfulness that the policy was not issued. He says the policy should have been issued. But the insured asked and understood that the insurance was to be one year, while the agent understood it to be three years. What effect can this have? The defense would use it to show there was no finished agreement, under that principle of law, stated above, that all elements must be agreed, and time is an essential element, and that when one party understands an essential element of the contract in one way, and the other in another way, the minds of the parties have not met on that essential element. But what practical harm can this circumstance do to the companies? The fire occurred within one year. The plaintiff says to the companies: "You are liable to me. You agreed to insure me for one year, and the fire occurred within one year." The companies plead in reply: "We are not liable because we agreed to insure you for three years." The plea is not good. It confesses the fact of insurance. It does not deny that the fire was in one year, and the fact that the term was three years is not material, the three years covering one year. The rate agreed was the usual one for three years. Croft's evidence, however, is that the term was one year. It is a case of conflicting evidence as to this. If he is believed their minds met on one year. We should not where two witnesses thus disagree, reverse the decree, there being no other evidence as to that.

It is contended for the defense that no company was named

as the insuring company at the time the agreement was made, and that never until a month later, when in the memorandum above mentioned, the agent wrote the New York Underwriters as the insurers, was there any particular insurer mentioned. Here the evidence of the plaintiff and the agent conflicts, the former saying that the New York Underwriters were named as the insuring parties. The defendant companies did business under that name. Let us say that no insuring party was named at the time of the agreement. The firm of K. S. Boreman & Son were insurance agents, doing business for the defendant companies, and also other companies, and both plaintiff and the one of said firm acting in this matter (to whom I have often referred above and may below, as agent) say that it was left to the agent to assign the risk; that is, give the insurance to what company they pleased. Croft, having confidence in the experience of the agents with the various companies, committed this discretion to them. This is often done. It is lawful and binding on the company selected by the agent, when they have policies signed in bank, to issue to whom they choose. It does not render the agreement incomplete as for want of contracting party. Wood, Ins. § 25, and note; May, Ins. § 59, end. The agents clearly had power to make a contract binding these companies by name as insurers at the time of the contract. Then, when the party insuring leaves it with the agents to select any of the companies represented by them, why is it not binding? If the party insured does not object, how can the company object? These two companies had an agreement that in all policies taken in the name of the New York Underwriters they should share premiums and liabilities in certain proportion. Until the agent does select the company, there is no contract; but when he does, then there is. Let the date of the memorandum naming the underwriters as the insurers be at the date of the agreement or afterwards, it was before the fire. It became, as to this point, a contract before the loss. The agent wrote to the companies after the fire that he had assigned the risk to them. *Sheldon v. Insurance Co.*, 65 Wis. 436 (27 N. W. Rep. 315) cited, is not in point. An

agent agreed to insure in some company represented by him, but not designated, on certain terms. The defendant decided to insure on different terms, but, before acceptance, the company declined to do so. Held, there was no contract. The judge, admitting that when it is left to an agent to select the company, it is binding when he designates the company said it is not a contract until he designates. The memorandum of designation there showed a rejection by the company, and the court held it a departure from the order of the company in designating a less premium than it had proposed to accept. The case of *Association v. Boniel*, 20 Fla. 815, is not in point. A sub-agent agreed to insure in a company not designated, and there is no showing that he was to select it, and he never did designate one, and he had no authority.

There is an indirect allusion in brief of counsel to the non-payment of the premium, but the point is not distinctly made. It would be untenable. The proof is full that the agreement was that when the policy should be sent, Croft would bring or send the money, or it could be charged to his father, and the agents assented. Now, insurance can be sold on credit as well as anything else. The agent can give credit. *Eagan v. Insurance Co.*, 10 W. Va. 583, 588; *Wood, Ins.* § 28; *May, Ins.* § 360 D; *Insurance Co v. Colt*, 20 Wall. 560; *Long v. Insurance Co.* (Pa. Sup.) 21 Am. St. Rep. 883, note, 20 Atl. 1014. Pre-payment is not necessary to the conclusion of an oral contract. *Wood, Ins.* §§ 22 A, 43 B. But, in addition, if credit had not been given, there was no obligation to pay until the policy was ready to be delivered, and the companies were to do that, and did not, though asked to do so. *Wood, Ins.* §§ 29, 30; *May, Ins.* §§ 22 A, 43 C.

The agent made out the memorandum in the name of W. M. Croft, not in that of plaintiff, Walter L. Croft, by mistake. The plaintiff owned the house and applied for the insurance, and made the agreement. From the fact that his father, W. M. Croft, had insurance from these agents, and the latter thought that the father owned the house, the mistake was made by the agent. The plaintiff says he told him the house was his. No pretense or claim of falsehood

or concealment is made against the plaintiff. The agent swears that it would have made no difference, as he would have as readily insured in the son's name. This mistake is mentioned in the brief, but merely mentioned. It can have no effect. Even a policy in a wrong name may be reformed and rectified after loss. This is a suit on an oral, executory agreement, and we are in a court of equity. May, Ins. § 566 A; *Thompson v. Insurance Co.*, 136 U. S. 295 (10 Sup. Ct. 1019); May, Ins. §§ 479, 482. This Court decided in *Deitz v. Insurance Co.*, 33 W. Va. 526 (11 S. E. Rep. 50) that where, by mistake, the agent wrote the name of the husband as the assured instead of the wife, it would not defeat recovery by the true owner. See, also, opinion in *Travis v. Insurance Co.*, 28 W. Va. 583. But this memorandum is not the contract. There is evidence to sustain the court in holding the agreement was with the plaintiff. The suit is on the oral contract. The memorandum is only important as showing a designation of the insuring companies; it is not the contract. Plaintiff in person applied for the policy and told the agent the house was his. The agent accepted the risk of the plaintiff in person, and why should we or the agent say the contract was with the father? The agent, as a witness, does not claim he was misled; attributes no bad faith whatever to the plaintiff. He inferred, because the plaintiff was a young man of thirty, and the father had a mill property close by, and was a man whose name was on the insurance book as to other insurance, that the father owned the house. It was merely his inference. The real contract was in fact and in law with the plaintiff. *Prima facie*, if the plaintiff did not mislead, it would be his contract. The agent says it was merely his inference. I repeat, the memorandum is not the contract. If it were, the mistake could be corrected.

Variance. This is relied on in a brief of counsel. As regards the matter last spoken of—the name—there can be no variance between allegation and proof. The bill alleges the oral contract as made with the plaintiff, and, as I have shown, the proof is of a contract made with the plaintiff. The memorandum is not the contract sued on; and if it were,

the bill states the mistake in it, and gives reasons of mistake, why it, if the gravamen of the suit, should be treated as one made with plaintiff. Either party may have even a written contract specifically enforced with such corrections as parol evidence may show to be necessary to correct a mistake. *Creigh v. Boggs*, 19 W. Va. 240.

Variance as to Date of Contract. There is no variance between bill and proof in this respect. The bill says that "about the middle of July, 1891, the plaintiff applied to the agent for the insurance," etc., "and that at that time, to wit, July, 1891," a certain agreement was made. The proof shows, I think, that this was on the 11th of August. Is it possible that we must, in a suit of equity, overthrow the decree for this? There is no variance. The substance and real point of the allegation is that a contract of insurance was made. The date is not material. Even if the bill said it was on a fixed day in July, it would not be fatal, the agreement not being a writing. Even in formal law actions, allegations of "time, place, quantity and value, when not descriptive of the identity of the subject of action, will be found immaterial, and need not be proved strictly as alleged. Thus, in trespass, the material fact is the assault, the time and place not being material." 1 Greenl. Ev. § 61. A distinction exists between allegations of matters of "substance," and matters of "essential description." The former may be substantially proven; the latter must be proven with a degree of strictness extending in some cases even to literal precision. *Id.* § 56. But here the bill does not tie itself to a fixed date, but is "about the middle of July." Now, if it were a note or instrument described by date, it would then be, in the words of Greenleaf, "matter of essential description," the earmark of identity, and strict proof would be required, and such cases as *Scott v. Baker*, 3 W. Va. 285, would apply. This date is not matter of substance, but the substance is the contract and its essential elements. If there were a variance in them, it would be different. Therefore, cases like *Railroad Co. v. Skeels*, 3 W. Va. 556, and *James v. Adams*, 8 W. Va. 576, do not apply.

Substantial and even-handed justice has been done in the

case by the decree, and, when that is so, there ought not to be a reversal, though on some point it may be open to question. 4 Minor Inst. 870; Barton Ch. Prac. 1139.

The agents agreed with the plaintiff, for a given consideration, to insure a particular house owned by plaintiff, in a sum which the agent was to and did fix and for a period of time covering the date of the loss by fire. Nothing remained to be done but issue the policy, which the agent promised to do. These things he himself proved. Both parties understood that the plaintiff was insured. Every element was final to base that policy on. The agents were authorized to issue it. His own memorandum told him every single element from which to issue it, except the name of the insured; and, had he issued it in the wrong name, the mistake could be corrected, and a suit maintained upon it. The only thing wanting is the policy to perfect the insurance. Whose fault that it was not issued? Where is the plaintiff in fault or default? To decide the case against the plaintiff, his house is lost, without the indemnity he fairly contracted for; to decide against the defendants is only to make them do what they fairly contracted to do. The defense set up at first blush inspires some questions; but, on consideration, it becomes a figment, which withers away.

Courts must not let insurance companies evade their policies through mere technicalities. They must be treated fairly, and only held up to their fair engagements. They are very valuable institutions, deserving patronage and encouragement; but when their contracts of indemnity prove worthless, for unsubstantial reasons, to those who are in distress and poverty from the waste of fire, against which their prudence sought to provide, it derogates from the efficacy of the policies and the confidence of the public in fire insurance.

For these reasons, we are clearly of opinion to affirm the decree.

CHARLESTON.

DEWING *et al.* v. HUTTON *et al.*

Submitted January 25, 1895—Decided April 13, 1895.

1. AGENT—LIEN FOR EXPENSES—TRANSFER OF POSSESSION.

An agent with unrestricted management of a mercantile, farming and general trading business, carried on in his name, with the right to buy, sell and exchange, has a lien on all the property accumulated in such business, and in his possession, for all advancements made, expenses and liabilities incurred, proper, necessary, or incident to such business, which is superior in right to any lien which may be created on such property by the reputed owner thereof; and while he may not, without the consent of those interested, transfer or assign such lien to another, yet he has the right to sell a sufficient amount of such property to satisfy such liabilities, or may transfer the possession thereof to a trustee, to be held by him until such liabilities are fully discharged, and the lien thereby extinguished.

2. AGENT—POSSESSION—TRUSTEE.

The possession of the trustee under such circumstances is the possession of the agent, and the lien is not released or waived.

3. AGENT—TRUSTEE.

Such trustee, with the consent of the interested parties, may sell the property and extinguish the lien.

4. CHANCERY COMMISSIONER'S REPORT—EXCEPTIONS.

When a commissioner to whom a cause is referred to settle large and intricate matters of account, containing many contested items, returns a report showing only an aggregation of items in accordance with his conclusions, and the report is excepted to for this reason, and the Circuit Court overrules such exceptions and confirms the report; on appeal this Court will reverse the decree of confirmation, and remand the cause, that a proper itemized statement of such accounts may be made.

L. D. STRADER and BROWN, JACKSON & KNIGHT for appellants.

JOHN BRANNON, JOHN W. MASON and BUTCHER & HARDING for appellant Hutton, cited 13 Pac. Rep. 442; Am. Dig. (1887) 1043; 1 Am. & Eng. Enc. Law 353; 23 Atl. Rep. 728; Am. Dig. (1892) 4231; Add. Con. App. p. 20, note 10; 14 S.

40	521
42	709

40	521
46	418

40	521
48	578
48	588

40	521
52	270
40	521
59	381

E. Rep. 849; Add. Con. App. p. 21, note 11; 1 W. Va. 109; 15 W. Va. 867; Story Ag. § 253; 1 Am. & Eng. Enc. Law 229; 1 Add. Con. 92 (bottom page); Am. Dig. (1887) 1045; Add. Con. App, 23, 24, note 13; 1 W. Va. 109; Am. Dig. (1890) 3101; 1 Add. Con. 87-89; 2 W. Va. 458; 1 Bates Part. 323-329; 1 Sto. Eq. Jur. §§ 307, 308, 315, 316, 323; 2 Add. Con. 778-9; Sto. Ag. 210-11; 138 U. S. 380; 129 U. S. 663; 79 Va. 158; 25 Gratt. 40; 21 W. Va. 617; S. E. Rep. 93; 17 Am. & Eng. Enc. Law 1054, 1055, 1056, 1061; 1 Am. & Eng. Enc. Law 372-381; 3 W. Va. 183; 16 S. E. Rep. 249; 1 Am. & Eng. Enc. Law 417. 418, 429, 435-6-7-8-9; 1 Gratt. 396; 9 W. Va. 206; 2 Add. Con. 381-2-6-7-8, 419; Dart. Vend. & Pur. 208, 215-16-17-18, 245; 3 Am. & Eng. Enc. Law 923; Am. Dig. (1892) 1846, 5233; 24 Atl. Rep. 18; 33 W. Va. 375, 386; 13 Atl. Rep. 956; Am. Digest (1888) p. 226, par. 164.

EWING, MELVIN & RILEY and BUTCHER & HARDING for the Arbogast Creditors, cited Code, c. 100, s. 13; Am. Dig. (1892) 4257; Id. (1890) 2571; 13 S. E. Rep. 383; 1 Gratt. 396; 8 W. Va. 291; 9 W. Va. 206; 10 W. Va. 35; 30 W. Va. 572, 579; 14 W. Va. 531, 548; 23 W. Va. 760, 771; 32 W. Va. 526.

W. T. ICE and E. D. TALBOTT for appellees, cited 6 Rand. 764 and 769; 3 W. Va. 561; Greenl. Ev. (11th Ed.) § 22; 10 Gratt. 198; 37 W. Va. 762; 27 W. Va. 639; 28 W. Va. 715; 29 W. Va. 116; 31 W. Va. 516; 31 W. Va. 137; 36 W. Va. 454; 38 W. Va. 670; 33 W. Va. 159; 26 W. Va. 710; 14 W. Va. 1; 21 W. Va. 698; 27 W. Va. 642; 28 W. Va. 379; 31 W. Va. 591; 32 W. Va. 591; 32 W. Va. 218; 28 W. Va. 715; 14 W. Va. 531; 19 W. Va. 459; 18 W. Va. 185; 38 Am. State Rep. 838; 23 W. Va. 760; 12 W. Va. 699; 23 W. Va. 724; 2 Hen. & Mun. 603; 6 Rand. (Va.) 509; 10 Leigh 155.

DENT, JUDGE:

Appeal of Elihu Hutton and others from a final decree rendered by the Circuit Court of Randolph county in a certain chancery cause therein pending at the suit of W. S. Dewing & Sons.

The circumstances which gave rise to this litigation are as follows, to wit: The plaintiffs, citizens of Kalamazoo,

state of Michigan, in the year 1885, sent defendant Winchester, an experienced timber man, into the state of West Virginia, with authority as their general agent, in whom they reposed great confidence, to buy timber lands for them. His agency was to be kept a secret, at least for a time, and purchases were to be made in his name; they to furnish the means, and pay him a salary of twenty five dollars per week.

Winchester on the 26th day of May, 1885, entered into a written contract with defendant Hutton—a man of wide experience and influence, and already in the business—to make purchases for him according to the stipulations and conditions contained in such contract. This was certainly within the scope of Winchester's agency, and inured to the benefit of the plaintiffs, who, by their many acts of acceptance, *etc.*, fully ratified what Winchester had done in this regard. This contract embraced lands within a certain boundary on the head waters of Cheat river, in the counties of Randolph and Pocahontas. A large territory was thus purchased, and passed into the possession and control of the plaintiffs, who, through their agent, began to cut and market the timber thereon.

In the meantime Winchester and Hutton entered into a partnership to buy lands on Gauley river and its tributaries; Hutton to do the buying, and Winchester to do the selling, at a minimum price of two dollars per acre; expenses to be deducted, and the profits to be equally divided between them. Afterwards B. L. Butcher was taken into the partnership, to assist in doing the work, in a legal capacity, and to have a share in the profits. Winchester wrote to the plaintiffs, telling them of this partnership arrangement, and proposing to them that they should take the lands at two dollars per acre—they to take his share of the profits, and pay for the land, including expenses and the profits that would be coming to the other members of the partnership; that this arrangement was to be kept a matter of secrecy between themselves. The plaintiffs at first declined to enter into the arrangement, but finally consented, with the understanding that Butcher was to be bought out, which was done and he was retired from the partnership. After-

wards Hutton was informed that the lands had been sold to the plaintiffs at two dollars per acre, and plaintiffs furnished the money to pay for the lands, the expenses and one half the profits to Hutton. It was the consideration of the fact that they were to have one half the profits that induced plaintiffs to purchase these lands.

In the meantime Winchester and Hutton had entered largely into the store and farming business at Huttons-ville, in Randolph county, which was principally managed by Winchester, through his agent, John C. Arbogast, in whose name such business was run, and by him conducted as manager. The fact that Winchester and Hutton were tacitly understood to be behind him gave him standing and credit, and a large amount of property was accumulated in his name. Winchester used the money of the plaintiffs in this business, pretending to them that it was going into the land purchases, but with the understanding with Hutton that if his earnings and interest in the land sales were sufficient to cover the Arbogast investments, in a final wind-up, Hutton was to have all the Arbogast property. Being speculative and visionary, no other result was ever contemplated by them, especially Winchester, but how he was to derive any benefit from the arrangement is not made to appear. W. S. Dewing, becoming aware of the extravagant notions and transactions of Winchester, and the wild chase he was leading Hutton, and fearing that his firm was about to lose some money, owing to the fact that they advanced, as he believed, a much larger sum than they had or would receive a return for, induced Hutton, without the knowledge or consent of Winchester or Arbogast, to execute a deed of trust on all his property, including the Arbogast property, for the purpose of securing the "payment of the account of Dewing & Sons against said Elihu Hutton, which approximately aggregates the sum of twenty five thousand dollars, which sum is made up of cash advances to said Hutton by said Dewing & Sons, through their agent, A. H. Winchester, in the purchase of real estate in West Virginia, subject, however, to settlement and adjustment hereafter by the parties in interest, as to credits." This

deed was executed the 16th, and recorded the 17th day of November, 1888. John C. Arbogast, learning of said trust deed, strenuously objected thereto, and refused to be bound thereby, in so far as the property under his control was concerned—claiming that such property was not the property of Elihu Hutton, but was the property of Winchester, whose agent he was, and insisting at least that all debts contracted by him in relation to the business were entitled to be first paid out of the proceeds of the property. He saw W. S. Dewing, who agreed that his claim was just, and admitted to the various creditors in Wheeling and Baltimore that their debts against Arbogast ought to be paid, but refused to enter into any writing to this effect.

On the 26th day of November, 1888, Hutton and Arbogast, understanding that it was with Dewing's consent, so expressed in the deed, executed another deed of trust, conveying the Arbogast property, in trust, to secure the claim of Dewing & Sons against Hutton, and the Arbogast creditors, on an equal footing. This deed was objected to, and never recorded. Finally, on the 3d day of December, 1888, a third deed of trust was executed by John C. Arbogast and Arthur H. Winchester, trustee, conveying to Joseph F. Harding, trustee, all the Arbogast property, to secure the Arbogast creditors, *pro rata*, and was admitted to record the 5th day of December, 1888. The trustee under the last deed took possession of all said property, and was proceeding to administer the same, and pay the debts thereby secured, when the plaintiffs filed their bill, obtained an injunction, and had said property taken charge of by a receiver of the court, and sought to have their trust debt declared a first lien thereon. Defendant answered said bill, claiming that he owed plaintiffs nothing, but on a fair settlement they would be justly indebted to him, and prayed for such a settlement, and a decree for any amount that might be due him against plaintiffs. John C. Arbogast and his creditors answered, claiming that their debts should be first paid out of the trust funds, in accordance with the last deed. Other answers were filed, and general replications thereto, and special replications to affirmative matters. Plaintiffs

also filed an amended bill, seeking further relief against defendant Hutton and others. The cause was referred to a commissioner to ascertain and settle the various controverted matters between the parties. The commissioner returned his report, to which the defendants excepted, but the court overruled the exceptions, and entered a decree in favor of plaintiffs, granting the relief sought; and from this decree defendant Hutton and the Arbogast creditors appeal.

The following is the assignment of errors: "*First.* The court erred in allowing the said injunction, or, if not error in allowing the same, it was error not to dissolve the same upon the hearing of the cause. *Second.* It was error to attempt, under the pleadings in the cause, to make a general statement and settlement of the accounts between the plaintiffs and the petitioner, as the proceeding had for its object, as the plaintiffs allege, the execution of the trust, and the correction of an alleged misapplication of the funds of the personal estate conveyed in trust. *Third.* It was error to attempt a settlement of the partnership account between the plaintiffs and the petitioner, as was done by Commissioner Ward, who finds that there was a partnership between petitioner and A. H. Winchester, agent for the plaintiffs, as to the 'Gauley purchases.' This partnership could be settled only upon proper proceedings had for the purpose, to which B. L. Butcher would be a necessary party; and for that purpose a proper suit is now pending in the said Circuit Court wherein the petitioner is plaintiff, and the plaintiffs herein, B. L. Butcher and others, are defendants. *Fourth.* It was error to decree in said cause, in favor of the plaintiffs, more than twenty five thousand dollars, with interest from November 16, 1888, as a lien under the deed of trust of that date, because the said trust deed only secured that sum of money 'subject to settlement as to credits.' *Fifth.* It was error to decree the proceeds of sale of the merchandise, live stock, and other property of the business at Huttonsville carried on in the name of J. C. Arbogast, to the plaintiffs, to the exclusion of the creditors of said business, because the social assets of said business

should be applied first to the social creditors thereof. *Sixth.* It was error not to have settled said business at Huttonsville as a partnership, independent from the accounts and transactions between the plaintiffs and petitioner on account of other matters. *Seventh.* It was error in the court below to overrule the several exceptions taken by petitioner, being Nos. 1 to 9, inclusive, to Commissioner Ward's report of date December 16, 1892, and to confirm said report as to the matters excepted to, for the reasons stated in said exceptions, and now referred to and asked to be read herewith, found on page 141, *etc.*, of record. *Eighth.* It was error to confirm said Commissioner Ward's report, dated as aforesaid, because the account raised and stated by him between the plaintiffs and the petitioner embraced items of charges against the petitioner not secured by his said trust deed, which was intended to secure any indebtedness which might exist from him to the plaintiffs, made up of cash advances in the purchases of real estate only. *Ninth.* It was error to decree any sum of money to the plaintiffs against said petitioner, because from the proofs taken by said commissioner, filed with his report and made part of the record, it will appear that petitioner is not indebted to the said plaintiffs in any sum of money, but, on the contrary, they are largely indebted to him. *Tenth.* It was error to confirm Commissioner Ward's said report because the proofs taken before him at the instance of said plaintiffs clearly show that the petitioner is entitled to credits on account of transfers of lands made to them under the said contract with their agent, A. H. Winchester, of May 26, 1885, in excess of that allowed by commissioner by said report, aggregating a sum exceeding sixteen thousand dollars, a part of which was allowed petitioner in plaintiffs' account filed herein. *Eleventh.* And because the conclusions and determinations of the commissioner in making up his said report are not sustained either by law or the evidence in this cause, as appears from the record thereof herewith presented."

The following are the exceptions to the commissioner's report: "The defendant Elihu Hutton excepts to the report

of Commissioner J. B. Ward in this cause, to be filed for the January term of the Circuit Court of Randolph county, 1893, and now in the office of said commissioner for examination, for the following reasons: *Second.* Because by said report said commissioner finds that a partnership existed between the exceptor, Elihu Hutton, and A. H. Winchester, the agent of Dewing & Sons, in the matter of the Gauley land transactions, and, therefore, in equity, between Hutton and Dewing & Sons (a fact which is clearly proven in this cause by the evidence which should be filed with said report) and then, upon the hypothesis that said partnership has been dissolved, proceeds to settle said partnership upon the theory that a dissolution of a partnership is a settlement of that partnership, and, in casting the accounts between the parties, has so intermingled said partnership items with items of conceded personal matters of account that it is impossible for exceptor or his counsel to distinguish between them—a proceeding not warranted by the pleadings and proof in this cause. All of which, exceptor insists, is illegal, inequitable, and erroneous, and again asks that all proof taken by said commissioner, touching the matter hereinbefore set forth be filed with said report. *Third.* Because by said report said commissioner, without regard to the various items which go to make up the account of plaintiffs against exceptor filed in said cause, finds that exceptor has received from plaintiffs, upon certain commingled accounts growing out of partnership and personal matters between them, an aggregated balance of one hundred and thirty two thousand six hundred and sixty dollars and twenty eight cents, in such manner as to render it impossible for exceptor to know which items of said account are carried into said aggregate, and which are not, thus rendering it impossible for exceptor to compare the commissioner's findings with the proof in the cause; to all of which exceptor objects and protests, and asks that said commissioner be required to file an itemized statement of account, composing said aggregate so found by him, with his said report as part thereof. *Fourth.* Because by said report said commissioner, contrary to the pleadings and proceedings in this cause, and the rules

of law and equity applicable thereto, has carried into the aggregate aforesaid certain items of account between plaintiffs and exceptor, growing out of the said Gauley partnership reported by him, when the proofs filed before him clearly show that said partnership is wholly unsettled; and further because by said report said commissioner carries said items of partnership accounts into the aggregate credits reported to exceptor, and into the balance reported due from exceptor to plaintiffs, when the proof shows that, exclusive of said partnership matters, said plaintiffs are largely indebted to exceptor; and further because of the attempted settlement of said partnership matters by said commissioner, when said proofs clearly show that one B. L. Butcher, Esq., was a member of said partnership, that said partnership is unsettled, and that said Butcher is not before the court as a party to this suit; and further because said commissioner, by said report, assumes that the sale of said Gauley lands by A. H. Winchester, while acting in his dual capacity of partner of said exceptor and agent of Dewing & Sons—a fact *now* known to said Hutton at that time, as shown by the evidence before the commissioner—to said Dewing & Sons, was made with the consent of said exceptor, or is in any manner binding on him, because the evidence taken before said commissioner in this cause wholly fails to warrant such assumption or finding. And to sustain this exception reference is again made to the proofs and papers aforesaid, which are asked to be filed with said report, as a part thereof. *Fifth.* Because by said report said commissioner finds that exceptor, Hutton, does not deny that he received from the plaintiffs the several sums making the said aggregate of one hundred and thirty two thousand six hundred and sixty dollars and twenty eight cents, when in fact the pleadings and evidence in this cause not only clearly show that said exceptor denies owing any part of said sum to said plaintiffs, but that he also denies that he received any such sum from them on all accounts, and because said commissioner further finds by the finding of said report last aforesaid, in effect, that the items of plaintiff's account not disproved by exceptor stand proven

simply because they appear on said account. *Sixth.* Because by said report said commissioner aggregates the credits to which he finds exceptor entitled, as against the account of the plaintiffs so aggregated as above at the sum of one hundred thousand seven hundred and forty eight dollars and ninety three cents, without reporting the items of exceptor's account filed in this cause which go to make up said aggregate, thus making it impossible for exceptor to compare said commissioner's findings with the proofs in said cause; to all of which exceptor objects, and asks that said commissioner be required to file an itemized statement of account composing said aggregate so found by him. And said exceptor further objects to said last named finding of said commissioner because said report shows on its face that the items considered by him in making up said aggregated credits were taken both from partnership and personal accounts. *Seventh.* Because by said report said commissioner disallows a large number of items appearing on exceptor's account filed in this cause against the plaintiffs, when the same are clearly proven by the evidence taken and filed before said commissioner, and, because under said findings of said commissioner in this particular, it is practically impossible for exceptor to tell which of the items of this said account have been allowed by said commissioner, and which disallowed. *Seventh a.* Because by said report said commissioner, after properly finding that exceptor is entitled to credit for certain items appearing on his account filed in this cause against the plaintiffs by virtue of and under the contract of May 26, 1885, for the purchase of the Cheat lands, disallows all the residue of the items of exceptor's said account claimed by him under said contract, because the lands for which said items were charged, respectively, were purchased, either after six months from the date of said contract, or were purchases made and conveyed by special warranty deeds, when said contract itself shows, when construed as a whole, that purchases thereunder are not limited to a period of six months; and further because the proof taken and filed before said commissioner clearly shows that the provisions of said contract were ex-

tended by parol agreement for sufficient length of time to include all the items of exceptor's account for lands purchased on Cheat; and further that the plaintiffs accepted said deeds of special warranty without objection, paid the purchase-money therefor, took possession of the lands so conveyed, and have held, occupied and used them continuously since. *Eighth.* Because said commissioner by said report finds that said exceptor, Hutton, is indebted to said Dewing & Sons in the sum of thirty one thousand nine hundred and eleven dollars, exclusive of interest, when the proofs taken by said commissioner, and papers filed with him (all of which should be filed with said report) clearly show that nothing is due the plaintiffs from this exceptor, under the pleadings in this cause, or under trust deed of November 16, 1888. *Ninth.* Because by said report said commissioner finds that the supposed debt so found by him to be due from exceptor to plaintiffs is a lien first in priority upon the personal property named in the trust deed of November 16, 1888, when the proofs in this cause clearly show that said property belonged to a partnership composed of said Elihu Hutton and A. H. Winchester, the agent of said Dewing & Sons, run in the name of John C. Arbogast, at Huttonsville, W. Va., and that it was so understood by the parties thereto at the time of the execution of said trust deed; and exceptor insists that all partnership debts shall first be paid out of said partnership effects, and further excepts to said last mentioned finding of said commissioner because he does not report that the legal title to said personal property passed to the trustee under the trust deed of December 3, 1888, instead of by the trust deed of November 16, 1888, and that the proceeds of the sale of said property should be applied to the discharge of the costs of executing the said trust of December 3, 1888, and the debts secured thereby, as, according to said proof, he should have done, and does not find that said personal property belonged to the partnership last aforesaid, and that said partnership was a part of the said Gauley partnership reported by him, as is clearly shown by the proofs and evidence, taken in this cause."

The exceptions of the Arbogast creditors and others are

similar to the ninth exception above, and therefore they are an unnecessary incumbrance, if here copied.

It is a matter of impossibility, in any reasonable space of time, to take up these prolix and extremely lengthy assignments of error and exceptions to the commissioner's report, and dispose of them in rotation. The attention of the learned counsel in this and other similar cases is respectfully called to the rules of this Court, to be found in volume 23 of the West Virginia Reports. If the counsel would acquaint themselves with, and endeavor to observe these rules, it would be a concession for which the Court would be truly grateful.

The two questions of main importance presented for consideration by this record are: *First*. Are the Arbogast creditors entitled to priority of payment out of the proceeds of the Arbogast property? *Second*. Has the commissioner made a proper statement and settlement of the accounts between the plaintiffs and the defendant Hutton?

For some reason, best known to themselves, neither plaintiffs nor defendants took the testimony of Arthur H. Winchester, and it is quite conspicuous by reason of its absence. Sometimes it was needed, and its suppression must operate against the plaintiffs, and at other times against the defendant Hutton, as Winchester appears to have been the mutual friend and dual agent—seeking, with truly altruistic disinterestedness, to advance the interests of both without injury or detriment to the other. He wanted the plaintiffs to become rich off of their purchases through the defendant Hutton, and he wanted Hutton to thrive magnificently off of his income from the plaintiffs, while for himself he had no thought, except to rejoice in the success of his friends, brought about by his labors. In his zeal to serve two friends whose interests were at times adverse, he overreached himself, and managed to get their business affairs in such a tangle as to lose the confidence of both, and involve them in a legal conflict, for the solution of which his evidence ought to have great weight and bearing, yet it is rejected by both alike.

From the pleadings and the evidence, and the lack of

evidence, it is plain that there was no partnership existing between defendants Hutton and Winchester, either in his own right or as the agent for plaintiffs, as to the Arbogast property. If such a partnership existed, defendant Hutton should have alleged it in his answer, and have been in position to prove it, as the burden was on him to do so. In this he utterly fails. On the contrary it is perfectly apparent that no partnership existed; that the truth with regard to this property is that A. H. Winchester started all the Arbogast business with the money furnished by plaintiffs to buy lands, with the understanding that he was to control and manage such business through his agent, Arbogast, until a final settlement of plaintiffs' affairs with Hutton, and then, if the amounts coming to Hutton from the land transactions were sufficient to cover the investments in the Arbogast store and farming business, the same was to belong to Hutton. In the meantime the title to such property was to remain in abeyance, apparently in Arbogast under the control of Winchester, as the agent of the plaintiffs, to secure them from any loss by reason of the investment of the plaintiffs' funds in such property for the ultimate benefit of Hutton. March 12, 1888, Winchester, by letter, notified the plaintiffs of the true condition of this property, as the following extracts show, to wit: "In Arbogast's name, owing to fact I could put him into possession, while in my own name I could only hold it constructively. I hold not less than ten thousand dollars personalty—everything he has—and not less than same amount of his store." "Second (Gauley). While, as between you and myself, I am your agent, as between him and myself I am his legal partner, and, before the law, would be your trustee to hold a partnership with him. This was formed first on basis of half and half. Then, my only mistake, two to him and one to me—you—he carrying all risks. Then last winter changed back to half and half, but in consideration of our not only carrying the risk that no longer existed, but, if essential, to carry his private affairs to extent of his prospective earnings. Third. Out of both the above grew an element of risk to you, to protect from which I, as commissioner, hold

all the outside matter mentioned on other page, and am to do so until final settlement of each of the first two accounts, after which anything left is his, but nothing before the fact is ascertained." In this letter Winchester informs plaintiffs, in words that can not be misunderstood, of the condition of the Arbogast property; yet they make no attempt to repudiate the arrangement in any way, but it appears to be perfectly satisfactory to them until W. S. Dewing, becoming dissatisfied with his firm agent, without consulting him or obtaining his consent, secretly, by inducements and promises, obtains from defendant Hutton the deed of trust of the 16th November, 1888, attempting to convey the Arbogast property to secure an approximate balance, to be afterwards ascertained of twenty five thousand dollars due plaintiffs from Hutton. As the extracts from the letter above show, plaintiffs knew the condition of this property, and under whose possession and control it was, and that it was held in trust as security for the payment of the very claim, if any, secured by the trust deed, and so held by his firm's authorized agent. The effect of the acceptance of this deed of trust by the principals was to abrogate the arrangement made by their agent with regard to said property, except in so far as the rights of third parties had attached; one of the objects clearly being to oust the agency of Winchester with regard to said property, and turn the same over to another and different trustee. Mr. Dewing could have accomplished the same purpose by going to Winchester, and telling him that his agency was at an end, and that he himself would take charge of the Arbogast property and business. But he preferred to do indirectly what might be unpleasant for him to do directly; and he hoped, to some extent, by so doing, to repudiate the acts of Winchester, or at least avoid their ratification. If Winchester was holding this property as a private security for his own benefit, nothing could pass by the trust deed, except Hutton's possible future contingency, which might never happen. Therefore it was only by recognizing the agency of Winchester in so far as the advancements to Hutton were concerned, that the deed of trust could effect the purpose for which it was executed, in any de-

gree. In either event the Arbogast debts must be first paid. If it was Winchester's private holding, Hutton could have no interest therein, and could convey none in trust without Winchester's consent. And if held by Winchester as agent either for Hutton or Dewing & Son, or both, he was entitled to retain the same until his debts and expenses incurred in relation to such property were fully paid off and satisfied. Being an unrestricted agent, with power to sell, he would have the right to sell the same for the purpose of paying such debts. Arbogast, the agent of the trustee, would have the same rights, especially when sustained therein by his immediate principal. Arbogast was the general agent of Winchester, and known so to be, both to the plaintiffs and the defendant Hutton, neither of whom ever raised a particle of objection to his agency; but he was permitted, in his own name, to carry on the business of trader, merchant, and farmer, buying and selling and contracting debts, all in connection with such business. And under section 13, chapter 100 of the Code, all the property, choses in action, stock, *etc.*, acquired or used in such business, are made liable for the debts of such person. And any conveyance of such property by the agent to secure the debts of the principal not contracted by the agent, and for which he is in no wise liable, would be on consideration not deemed valuable in law as to him, and therefore null and void as to the creditors of the agency business. And any conveyance made by the principal would be abortive, to the same extent, and for a similar reason. Otherwise the grossest fraud could be perpetrated by the hidden principal and his agent, the ostensible owner of property, upon those innocently dealing with such owner in relation to such property. An agent has a lien on the funds and property of the principal in his possession and under his control for moneys advanced or liabilities incurred when proper, necessary, or incident to his agency. Mechem, Ag. § 684; *Ruffner v. Hewitt*, 7 W. Va. 585; 1 Am. & Eng. Enc. Law 428; 3 Am. & Eng. Enc. Law 333; Story, Ag. § 376. Having such lien, he has the right to pledge the property to the amount of the lien. *Warner v. Martin*, 11 How. 209. "Where an agent

purchases goods in his own name, he is clothed with all the *indicia* of ownership, and has the right to either sell or pledge the goods." *Lect v. Wadsworth*, 5 Cal. 404.

An agent can not be deprived of his lien, without his consent, by an act of the principal. Arbogast had possession of the property in controversy, with every *indicia* of ownership, acting as the agent of Winchester. The plaintiffs and defendant Hutton deny any interest in the property, except such as the plaintiffs may have by virtue of Hutton's trust deed. If these separate pretensions be accepted, the property must be regarded as belonging to Winchester, and Hutton's deed passed no title to the trustee. And the deed of Arbogast and Hutton, having been made without Winchester's consent or knowledge, is invalid in so far as it secures any debts other than those belonging strictly to the agency. And, in any event of ownership, to such extent the last mentioned deed was invalid, for the reason that Arbogast, in executing it for such purpose without the consent of Winchester, as owner or trustee, exceeded his authority.

But the trust deed of the 3d of December, 1888, executed by Arbogast to secure the agency creditors, was rendered valid beyond controversy, by Winchester consenting thereto and uniting therein.

On the other hand, treating the property as conditionally Hutton's under the management and control of Winchester, as trustee, through Arbogast, as his agent and the ostensible owner, both Arbogast and Winchester have a lien on said property for all liabilities contracted in the management thereof, with the right to retain possession, and, being clothed with the power, the right to sell a sufficiency thereof to pay such liabilities, superior to the rights of Hutton, or plaintiffs, claiming through him. And, with the consent of all interested parties, they had the right to execute the trust for the continued security of the liabilities incurred, and thus merge their lien and possession in the trustee, Harding, for their use and benefit. To this disposition of the property the evidence, by a decisive and convincing preponderance, shows that both plaintiffs and defendants consented. And this disposition was in accordance with the law.

Admitting that plaintiffs did not consent, then the possession of the trustee Harding remained the possession of Winchester and Arbogast, for the security of their liabilities, and continues in the receiver, for the reason that they have never surrendered their legal right to hold the property for any other purpose than the trust aforesaid; and if such trust for any reason, should not prove effective, they are entitled to a restoration of their possession and lien aforesaid.

While an agent may not transfer or assign his lien to another, it being personal to himself, yet he may make another his agent or trustee to hold the property to which the lien attaches, for his benefit, until the lien is legally satisfied. *Bigelow v. Walker*, 58 Am. Dec. 164. Equity never requires an honest grantor to surrender a right not contemplated or included within the terms of an ineffective grant, and when the plaintiffs seek its aid they must be prepared to do equity. Plaintiffs may complain that their funds, through their agent, formed the basis of the property in controversy. When they repudiated and ignored the act of their agent in holding the property as a security for them, and charged the funds directly to Hutton, they waived the right to seize the property on the grounds of a misapplication and breach of trust, and affirmed the advancements made in excess of the land purchases. Any loss they may incur by reason thereof they may charge to their attempt to rid themselves of their agent, Winchester, by an indirect, instead of a straightforward course. If he had the "big head," their letters of praise and conduct of faith and trust lie at the basis of it. There is nothing in this case to indicate that he was acting otherwise than zealously, in good faith, in attempting to promote the respective interests of both the plaintiffs and defendant Hutton. He may have made mistakes and incurred losses. Such things are not uncommon. "It is human to err, but it is divine to forgive." Plaintiffs trusted him, and if, by giving him their confidence, and allowing him the use of their means, they led others to trust him, they should not expect to escape the consequences of their conduct to the injury of innocent parties misled there-

by. Of two innocent sufferers, the one least to blame has the better equity.

The sole question for us to decide is whether the agency lien of Winchester and Arbogast is entitled to priority, as to this property, over the lien acquired by plaintiffs by virtue of the deed of trust from Hutton. To this there can be but one answer, and that is that the Arbogast creditors, under the circumstances of this case, must be first paid out of the Arbogast property, and that the plaintiffs' trust lien, when rightly ascertained, must be postponed and made second in priority as against such property.

As a case of partnership in some respects analogous, see *Darby v. Gilligan*, 33 W. Va. 246 (10 S. E. Rep. 400); also *Baer v. Wilkinson*, 35 W. Va. 422 (14 S. E. Rep. 1)—which cases would be pointedly applicable if there was a partnership between Hutton and Winchester. The only interest, then, that plaintiffs have in the Arbogast property by virtue of the deed of the 16th of November, 1888, is the right to the residuum after the payment of the agency creditors. They therefore had such an interest in the property as justified the filing of their bill, and if losses are sustained by reason of the injunction, the removal of the trustee, and the appointment of a receiver, it will probably fall most heavily upon themselves. As the amount secured by the trust was indefinite, and subject to settlement, it could not be properly ascertained and fixed without a complete adjustment of all the transactions between the plaintiffs and defendant Hutton.

B. L. Butcher is not a necessary party to this suit, for the evidence shows that he long since parted with his interest in the Gauley partnership to his co-partners. This partnership was first formed between Winchester and Hutton. It was for a specific purpose. Lands were to be bought as low as possible, and Winchester was to sell the same for not less than two dollars per acre, and the net proceeds were to be divided between them. Winchester induced the plaintiffs to purchase the lands at the price named by agreeing that they should have his share of the profits, and thereby ostensibly led them to take his place in the partnership.

Defendant Hutton was satisfied with the price of two dollars per acre, as it realized a very handsome profit. One partner has the right to sell out to the other, and thus close the relation; and there appears to be no unsettled question, except as to the division or proper amount of the profits. It is true that defendant Hutton claims that this Gauley partnership had some connection with the Arbogast business, but the evidence fails to sustain any such claim, and his own conduct disproves it, supplemented as it is by the allegation of his answer.

There are a great many disputed items controverted by both plaintiffs and defendant Hutton in each other's accounts, and yet the commissioner without making an itemized statement, charges defendant Hutton with a total sum of one hundred and thirty two thousand six hundred and sixty dollars and twenty eight cents and credits him with a total sum of one hundred thousand seven hundred and forty eight dollars and ninety three cents, finding a net balance of thirty nine thousand nine hundred and ten dollars and forty one cents, including interest. The defendant excepted to the report for this reason, as he was unable to tell what items entered into these aggregate amounts, and therefore he could not intelligently except to the allowance or disallowance of any special item. This exception should have been sustained, and the report recommitted, with direction to the commissioner to make an itemized statement, showing item by item the credits, debits and all sums disallowed. In no other way can the court examine and pass upon such report, unless it accepts as a finality the action of its commissioner. Such, however, is not the law. A commissioner is intended to aid the court. This Court has no such officer, and, when this duty has not been properly performed, there is no alternative but to reverse the case, and send it back to be recommitted. To pursue any other course would be to try the whole controversy *de novo*, impose on this Court the duties of a commissioner, and the determination of the litigation as in a court of original, instead of appellate, jurisdiction.

There is one other exception to the commissioner's report

worthy of notice at the present time, and that is that the commissioner rejected from the defendant Hutton's credits all lands which were not purchased within six months of the date of the contract of the 26th May, 1885. or which were conveyed with covenants of special warranty. If plaintiffs obtained such lands and conveyances under and by virtue of said contract by extension of time or otherwise, and have possession and control thereof, without repudiating the same, they should be charged therewith; but each case must be determined in and of itself, which can only be done when a proper report is made.

For the foregoing errors the decree complained of is reversed, set aside and annulled, and this case is remanded to the Circuit Court, to be recommitted to the commissioner, with direction, without regard to his former reports, to make a complete itemized statement of all transactions between the defendant Hutton and the plaintiffs, by themselves or through their agent, Winchester, giving and showing all proper credits and debits, and each item disallowed; and to be further proceeded in according to the foregoing opinion and rules of equity.

CHARLESTON.

FARLEY *et al.* v. BATEMAN *et al.*

Submitted February 1, 1895—Decided April 13, 1895.

SUBSEQUENT PURCHASER—UNDOCKETED JUDGMENT.

The fact that a subsequent purchaser had notice of a prior undocketed judgment may be inferred from circumstances, as well as proved by direct evidence.

W. G. HUDGINS for appellants, cited 30 Gratt. 292; 37 W. Va. 552.

HAYNES & STANARD for appellees, cited 37 W. Va. 675; 27 W. Va. 442; 35 W. Va. 719; 27 W. Va. 206; 22 W. Va. 356; 17 W. Va. 717; 38 W. Va. 248; 27 W. Va. 677; 27 W. Va. 16;

40	540
48	391
48	490
48	694

40	540
47	289

40	540
48	475

40	540
50	338

40	540
165	248

28 W. Va. 774; 55 Am. Dec. 678; 48 Mich. 465; 64 Pa. St. 120; 19 Am. & Eng. Enc. Law p. 70, note; 5 Leigh 695, 712; 16 Am. & Eng. Enc. Law 790; 84 Am. Dec. 552; 62 Am. Dec. 347; 65 Am. Dec. 283; 67 Am. Dec. 63, 74 and note; 25 Am. Dec. 215; 16 Am. & Eng. Enc. Law 837; 3 Story 364; 1 Story 172; Bump. Fraud. Conv. 493.

DENT, JUDGE:

Thomas G. Mann appeals to this Court from a decree of the Circuit Court of Summers county, holding, at the suit of Farley Bros., plaintiffs, that a certain deed, executed to him on the 2d day of April, 1894, by F. M. Bateman, was void as to certain judgments held by said plaintiffs against said Bateman.

The facts are as follows: On the 14th day of February, 1894, the plaintiffs obtained a judgment for the sum of fifty three dollars and fifty three cents with interest, and seven dollars and fifteen cents costs, before Justice H. Ewart of Summers county. This judgment was not docketed until April 9, 1894. March 15, 1894, an execution issued on said judgment. On the 2d day of April, 1894, said Bateman conveyed all his real estate to defendant Mann in consideration of one hundred and seventeen dollars and seventy six cents, being a balance due said defendant on two several judgments held by him against said Bateman for legal services rendered. Said judgments were liens on the land conveyed, and prior in right to plaintiffs' judgment.

On the same day Bateman scheduled against plaintiffs' execution. The schedule was written just after the deed, in the law office of Mann & Gwynn, by Walter M. Gwynn, member of the firm. Bateman, by conveying away all his real estate, and claiming all his personal property exempt, rendered himself hopelessly insolvent. By sections 5 and 6, chapter 139 of the Code, judgments of justices of the peace are liens on all real estate of the judgment debtor, except as to a purchaser for valuable consideration without notice they are only liens from the time of docketing.

The question presented in this case is whether the defendant Mann was a purchaser for valuable consideration with-

out notice of plaintiffs' undocketed judgment. The fact of notice may be inferred from circumstances, as well as proved by direct evidence; and where the facts and circumstances are such as to raise a presumption of notice, the burden of proof is shifted, and it devolves upon the defendant purchaser to prove want of notice. *Newman v. Chapman*, 2 Rand. (Va.) 93; *French v. Loyal Co.*, 5 Leigh, 635; 16 Am. & Eng. Enc. Law, 790.

It is said a court of equity "has a quick eye to detect fraud." A boy may satisfy his mother that his wet hair is the result of sweat, and not of his going in swimming contrary to her commands, but he will hardly convince her that his back and arms were sunburned, and his shirt turned wrong side out, in crawling through a rail fence backwards. And so, in cases of this character, one suspicious circumstance, taken alone, may be easily explained; but, when a number result from the same transaction, the explanation will hardly be sufficient. T. G. Mann, the purchaser, was, and had been, Bateman's lawyer. He knew he was insolvent. He had judgments against him, on which he was pressing. Bateman had had a public and contested lawsuit before a justice of the county with the plaintiffs, who obtained a judgment against him, and on which there was an execution issued, and in the hands of a constable for collection. He goes to Mann's office, and in the presence of both partners executes a deed to Mann for all his real estate. Then Mann walks out of the office, and the other partner writes a schedule of Bateman's personal property, to be used against plaintiffs' execution, and then Mann comes back.

These facts, unexplained, would lead any unprejudiced and disinterested person to believe that Mann not only had notice of the judgment, but was engaged in aiding the debtor to escape its payment. And yet he fails to testify with regard to the matter, and thus firmly clinches the inference of notice according to well settled equitable principles. *Goshorn's Ex'r v. Snodgrass*, 17 W. Va. 717; *Parker v. Valentine*, 27 W. Va. 677; *Bindley v. Martin*, 28 W. Va. 774; *Trust Co. v. McClellan*, 40 W. Va. 405 (21 S. E. Rep. 1025). The final

decree, being in favor of plaintiffs in effect overrules demurrers to the bill.

For the foregoing reasons the court finds no error in the decree complained of, and it is therefore affirmed.

CHARLESTON.

HORN BROOK, *et al.* v. TOWN OF ELM GROVE, *et al.*

Submitted January 24, 1895—Decided April 13, 1895.

40	543
42	288
40	543
49	730
49	732

1. MUNICIPAL CORPORATION—FORFEITURE OF CHARTER.

A forfeiture of the charter of a municipal corporation can not be enforced or taken advantage of in any legal proceeding collaterally or incidentally. That forfeiture must be declared in a proper, direct way. The state only can enforce such forfeiture, as it alone has the right to waive or enforce it.

2. MUNICIPAL CORPORATIONS—FORFEITURE OF CHARTER.

The forfeiture of charters of towns for the causes defined in Code, c. 47, s. 44, must be governed by the principles above stated. Quaere, can such forfeiture be declared by any judicial proceeding?

3. MUNICIPAL CORPORATIONS—PARTIES TO SUITS.

A suit to enjoin the collection of municipal taxes, on the ground that they were illegally imposed by reason of want of authority to impose them from forfeiture of the municipal charter, is not wrongly brought, from the mere fact that the town is sued in its corporate name. So bringing the suit does not admit its continued existence.

ERSKINE & ALLISON and W. P. HUBBARD for appellants, cited Code 1868, c. 47; Const. Art. VI, § 39; Code, 1891, c. 47, s. 44; 30 W. Va. 43; 32 W. Va. 98; 102 U. S. 511; 1 Black, Pub. Corp. § 63, 425, note; 63 Tex. 520; 38 Kans. 744; 1 Dill. Mun. Corp. § 112; 2 Dill. Mun. Corp. § 896; 1 Black, Pub. Corp. § 118, 119; 11 Gratt. 572; 78 N. Y. 524; 72 N. Y. 245; 75 N. Y. 335; 86 N. Y. 69; 73 N. Y. 389; 61 Me. 160; 36 Conn. 196; 101 Pa. St. 391; 73 Tex. 624; 34 Ill. 320; 107 N. Y. 159, 170; 45 Cal. 385; 3 Cranch. 338; 62 Cal. 251, 257; 6 Mich. 447, 455; 10 Mich. 125, 134, 135; 93 U. S. 258; 10 Tex. 137; 41

Mich. 647; 15 Mich. 463; 5 Mich. 114; 6 Mich. 447; 10 Mich. 125; 13 So. Rep. 251; 23 W. Va. 667; 38 W. Va. 122; Id. 219.

HENRY M. RUSSELL for appellees, cited 39 W. Va. 142; 129 Ill. 169; 37 W. Va. 520; 24 Am. & Eng. Enc. Law 33; 32 W. Va. 6; Code 1868, c. 47, s. 44; 31 W. Va. 384, 389; 123 Ind. 540; 32 Pac. Rep. 66; Acts 1890, pp. 141, 142, 164; 30 W. Va. 43; 118 U. S. 444; Cooley's Const. Lim. 309, 310; Am. & Eng. Enc. Law, 964; Dill. Munn. Corp., § 720, note; 61 Ill. 397; 1 Beach, Pub. Corp. § 55; 22 S. W. Rep. 888; 15 Mich. 463; 3 W. Va. 319; 30 W. Va. 282; 66 Cal. 288; 29 Iowa 264; 113 Ill. 491; 30 W. Va. 430; 100 U. S. 525; Const. Art. VI, s. 39; 43 N. J. L. 542; 78 Ky. 140; Code, c. 109.

BRANNON, JUDGE:

Henry H. Hornbrook and others, for themselves and all other tax-payers of the town of Elm Grove, filed a bill in equity in the Circuit Court of Ohio county against that town and its officers, praying that the collection of taxes imposed on them by the town might be enjoined, and an injunction which was granted was afterwards dissolved, and the plaintiffs appeal.

The single ground on which the counsel for the plaintiffs in this Court seek to rest their case is that the town has for more than one year failed to keep its streets, alleys, walks and gutters in good repair, and has thereby forfeited its charter, and become extinct, and therefore has no power to impose taxes. This position rests on section 44, chapter 47, Code, reading: "Any city, town or village which shall fail for one year to keep its roads, streets, alleys, sidewalks and gutters in good order and repair, or which shall fail for one year to exercise its corporate powers and privileges, shall thereby forfeit its charter, and all the rights, powers and privileges conferred thereby."

It will be seen at once that this suit is not one having for its purpose to ascertain and declare the fact working the forfeiture of the town's charter, but that it seeks to do this collaterally, and thus make the forfeiture effectual, without any direct judicial declaration of the forfeiture. It is said

the very letter of the Code above quoted says that, because of certain defaults, the town shall "thereby forfeit its charter" *ipso facto*; that if that default be found, no matter about the form of proceeding, it paralyzes the acts of the town. It is true that that omission is made by the Code a cause of forfeiture; but is that to be inquired into, and, if found, to be enforced, in a purely collateral proceeding? Or must there be some judicial inquiry in a proceeding proper to ascertain and declare the cause of forfeiture? Must there not be a direct judgment of death upon the municipal corporation? The general rule is well established that the corporate existence of a municipal corporation can not be questioned collaterally. Beach, Pub. Corp. § 55; Cooley, Const. Lim. 254; 15 Am. & Eng. Enc. Law 964; 2 Kent, Comm. 312. "An incorporated town retains its corporate capacity until its charter is declared forfeited in a direct judicial proceeding. It can not be held, in any collateral proceeding, to have forfeited its charter by *non-user*." *Harris v. Nesbit*, 24 Ala. 398.

In an action by a town to collect taxes, it was held that the legal existence of the corporation could not be tested in such action. *Town of Geneva v. Cole*, 61 Ill. 397. Of course, this rule will apply whether the existence of the town depends on the invalidity of its charter in the start or subsequent forfeiture. Suppose this were not the rule. Chaos would reign. Whenever the town would proceed to punish one for any offense against its order and peace, or enforce its taxes, or sue to enforce its rights, or take any step under color of its charter, there must be an investigation before every court, high or low, as to whether it had kept its streets, alleys, walks and gutters in order, and minute inquiries would be made into the sufficiency of their order, and in some instances the mayor or alderman, if he thought the streets were not in proper order, would have to abdicate his seat, because of the forfeiture of the town's life. Where would be the end of the confusion? What towns would it afflict? What towns would it not afflict? Is it possible that our legislature has changed this salutary rule by the section of the Code quoted? We are under that principle,

unless by reason of it. And what is there peculiar in it—so peculiar as to revolutionize the rule in West Virginia? It merely declares that for *non-user* and *misuser* the town shall forfeit its charter. The words “thereby forfeit” in the statute are not unusual in such cases where the purpose is to declare a certain fact a cause of forfeiture, fine, or other legal result. It means only that “by reason of” or “because of” such and such facts the charter shall be forfeited. It is only equivalent to the word “because,” in the language, “shall because of such failure forfeit its charter to the state.” *Lumber Co. v. Ward*, 30 W. Va. 43 (3 S. E. Rep. 227). It states the cause of forfeiture, and states that such cause shall of itself work a forfeiture. But why not in this as well as in other instances apply the rule that there must be a direct proceeding to ascertain and adjudge that fact? There is no reason why this instance is out of the general rule, and every reason why it is within it. We must have a clearer expression than is here found of a legislative purpose to specify a cause of forfeiture, and dispense with direct judicial inquiry as to the existence of that fact, and an affirmative judgment of the forfeiture of the charter.

We are referred to our statutes forfeiting lands for omission of assessment or non-payment of taxes as instances of forfeiture by statute, *proprio vigore*, without judicial sentence; but that legislation was declared by the court in *Levasser v. Washburn*, 11 Gratt. 572, as having a certain public policy “to remedy certain evils for which prompt, summary, and decisive measures were indispensable,” as stated in that case. That legislation specified the cause of forfeiture, declared that cause should forfeit the land, and gave the land at once by legislative grant to certain persons, thus evincing an intent to dispense with any inquest upon the facts producing forfeiture. That decision depended on that particular legislation, which to answer a certain public policy, plainly evinced, for reasons stated in that case, a design to at once forfeit the titles of certain persons, and at once give them to others. No such policy or necessity here exists. There is no analogy of force between legislation to forfeit lands of private individuals for neglect of public duty and

legislation forfeiting the very existence and cutting short the functions of public corporations constituting a part of the machinery of governmental administration.

Even as to private corporations, our rule is, as it is everywhere, that there must be direct judicial adjudication of the fact causing the forfeiture and of that forfeiture, and I think the reasons for requiring it in the case of towns are tenfold stronger than in cases of private corporations. In *Baltimore & O. R. Co. v. Supervisors, etc., of Marshall Co.*, 3 W. Va. 323, the Court declared the principle that a forfeiture of a corporate charter must be judicially declared before its forfeiture could be recognized in any court. The charter act provided that if the road should not be completed by a certain date "then this act shall be null and void;" thus abrogating the very act giving corporate life—a stronger case for forfeiture without judicial sentence than this. Could there be a stronger? The court said the question of forfeiture could not be raised except by a proceeding in the name of the state against the company to declare and determine judicially the forfeiture and annul the charter. As regards the language of the act, that was as strong an instance of legislative intent to at once forfeit as this, if not stronger. So in *Lumber Co. v. Ward*, 30 W. Va. 43 (3 S. E. Rep. 227) it was held that "a cause of forfeiture can not be taken advantage of or enforced against a private corporation collaterally or incidentally, or in any other manner than by direct proceeding for that purpose against the corporation, so that it may have an opportunity to answer; and the state can alone institute such a proceeding, since it may waive a broken condition of a compact with it as well as an individual can."

But it is said that the reason of such decisions, as to private corporations, is that they are contracts with the state, and can only be forfeited by due process of law, by judicial hearing, as mere laws can not impair the obligation of contracts. I fail to be impressed that this draws a substantial difference. In both cases the state created or granted the franchise. It is with it to enforce or condone the forfeiture as much in the one as in the other case, contract or

no contract. Indeed, it is more necessary to vest this right of enforcement or condonation of the forfeiture in the state in case of a town than in case of private corporations, because a town is a part of the government, delegated as the agent of the state to administer government in its stead in a given locality and in certain respects; and, the powers of government being vested in the state, it ought to be left to it to say whether the interests of the people to be affected will be better promoted by the abolition or continuance of the municipal charter. If the idea is that the power to end the charter being with the legislature, it has in advance provided that in a certain event it shall *ipso facto* instantly cease, it is plain that the theory of contract is not an element of this proposition, and can not be used as a reason why we should dispense with the rule requiring a direct declaration of forfeiture. As stated above, I do not think the words "thereby forfeited" amount to a legislative forfeiture in advance, without sentence. The statute merely specifies a cause of forfeiture, leaving its ascertainment to be governed by the general law on the subject.

The case of *Oakland R. Co. v. Oakland B. & F. V. R. Co.*, 45 Cal. 365, is especially called to our attention. It was an injunction to restrain a company from building a railroad because the charter limited its construction to certain time, and provided, in case of failure, the franchise should "utterly cease and be forfeited," and it was held it was a forfeiture by the act without judicial declaration. Variant decisions, as confusing as an Egyptian labyrinth, can be found in the vast number of decisions in different national and state courts in the endless series of reports. We must select those most persuasive to us. But we must follow our own reports. Shall we leave the cases of *Baltimore & O. R. Co. v. Supervisors, etc., of Marshall Co.*, and *Lumber Co. v. Ward, supra*, and follow the California case? *Upham v. Hosking*, 62 Cal. 250, followed the case just cited. It was a franchise granted to individuals, not a corporation. The remarks of Marshall, C. J., in *U. S. v. Grundy*, 3 Cranch 337, that where the forfeiture is by common-law nothing vests in the government until some legal step has been taken to assert the right.

but a statutory forfeiture is different, were made as to a statute declaring a vessel forfeited if a false oath were taken to procure a register. It was a forfeiture by a private individual of private property, not like the government's solemn grant of incorporation for municipal purposes, or a private corporation. *Per contra* the California cases, I may cite the case of *Bank v. Dawson*, 13 La. 497. The statute enacted that if a bank suspend specie payment for more than ninety days, "the charter shall be *ipso facto* forfeited and void." Here was a much stronger statutory declaration of forfeiture than in this case. It was held that a cause of forfeiture can not be taken advantage of or enforced against a corporation incidentally, or in any other mode than by a direct proceeding instituted by the government, because it may waive a broken condition of a contract or charter, as well as an individual, and that it continued to exist as long as the state did not claim the forfeiture. I think this decision supported abundantly by authority almost universal.

But it is agreed that no proceeding in any court by *quo warranto* or other process lies to declare the forfeiture of a municipal corporation, and therefore the section of the Code declaring that for certain causes the charter shall be forfeited would be a dead letter and not enforceable, unless it may be enforced in a collateral way, such as is proposed in this suit. This is not a *quo warranto* or other such direct proceeding, and we are not called upon to decide whether *quo warranto* or other judicial process would lie, and it would be perhaps *obiter dictum* to decide it in this case.

Speaking for myself, I do not think *quo warranto* or any other judicial process lies to forfeit the charter of a municipal corporation, and this because it is a part of the government itself, and it lies only with the legislature to take away its charter. Think of a court declaring the charter of the city of New York forfeited. "Municipal corporations are mere instrumentalities of the state for the more convenient administration of local government. Their powers are such as the legislature may confer, and these may be enlarged,

abridged or entirely withdrawn at its pleasure. This is common learning, found in all adjudications on the subject of municipal bodies, and repeated by text writers. There is no contract between the state and the public that the charter of a city shall not be at all times subject to legislative control." *Meriwether v. Garrett*, 102 U. S. 511. So has said this Court in *Probasco v. Moundsville*, 11 W. Va. 501, and *Board of Ed. v. Board of Ed.*, 30 W. Va. 424, 430 (4 S. E. Rep. 640); 1 Beach Pub. Corp. § 63.

Such a corporation being thus a part of the very government itself, its agent by it constituted to perform certain functions, even legislative functions, which belong exclusively to the legislature as a separate department of the government, if the judiciary can annul the charter, it invades the domain of the lawmaking department by abolishing the agency, and its powers to administer government as directed by the legislature, in opposition to its will that such functions shall be administered by its own chosen agent. The very power to constitute the agent is here a legislative prerogative, and that power is nullified by a court, and the powers committed to that agent, confessedly pertaining to the legislature, can no longer be exercised as commanded and deemed wise by the legislature, and its powers are to that extent thwarted and crippled.

In England the power is exercised by *quo warranto* and *scire facias*. The charters of London and of the colonies of Massachusetts, Rhode Island and Connecticut were thus abrogated. Mr. Beach expresses the opinion, as also Judge Dillon, that the judiciary can not here exercise this power, since these corporations being purely public corporations, composed of citizens, formed only for local government by the legislative department, to give the judiciary the power of dissolution would make it co-ordinate with the legislative power in control of local government and local legislation, and the power over municipal corporations vested in the legislature is limited only by the constitution, and in it the legislature can have no rival, and neither the judiciary nor the

executive can create or destroy a municipality, which is but a subdivision of the state government. Dill. Mun. Corp. §§ 112, 168, 720, 896; Beach, Pub. Corp. §§ 118, 119. There are cases, however, holding that the power to declare a forfeiture exists in the courts. *People v. City of Riverside*, 66 Cal. 288 (5 Pac. 350); *State v. Independent School Dist.*, 29 Iowa 264; *Dodge v. People*, 113 Ill. 491 (1 N. E. Rep. 826.)

But grant that there is no judicial process directly to declare the forfeiture. Does that compel us to say that it can be enforced judicially in collateral proceedings? By no means; but the legitimate, logical conclusion therefrom would be that as there is no direct there can be no indirect process; that if you can not accomplish the result directly, you can not collaterally. It is enough for us to say that in the indirect way proposed in this suit, the power of taxation essential to the exercise of the powers of a town, and which is lawful unless the corporation is defunct, can not be denied. But there is a remedy, and in my judgment the only remedy, and that is with the legislature. It gave; it alone can take away. It is with it, as it ought to be, to say whether the public interest involved will be better promoted by looking over the *misuser* of the corporate powers, and trusting for better things from the present or another set of officers, or to blot out the municipality. The fact that our constitution in article VI, section 39, provides that the legislature shall not pass local or special laws incorporating cities, towns, or villages, or amending the charter of any city, town or village containing a population of less than two thousand, but it shall provide by general law for those cases, does not take away that power residing in that body to repeal or declare forfeited a charter of a town. The legislature can do anything not prohibited. The object of the provision was to prevent multitudinous special acts creating or amending municipal charters consuming the time of the legislature; but this limits only the power to create or amend charters, and it does not prohibit the repeal of a charter by special act, or anything trenching on the power of the legislature over municipal corporations existing. See *State v. Steen*, 43 N. J. Law 542.

Were this a proceeding directly assaulting the corporation, I should say private individuals could not maintain it, but only the state. There would be more reason for confining this power to the state's election than in cases of private corporations. It ought not to lie with individuals, from mere personal interest, caprice or impulse of prejudice, to make suggestions of *misuser*, and make the existence of towns the football of litigation. Cooley, Const. Lim. 254.

Counsel for appellees suggests that this suit is wrongly brought against the town, and should be only against its officers, and that in suing the town its continued existence is admitted. *People v. City of Spring Valley*, 129 Ill. 169 (21 N. E. Rep. 843) supports this contention. But reputable authorities cited in it say that there is a distinction between private and municipal corporations in this respect, and that an information against a municipal corporation by its corporate name, even where its corporate existence is challenged, is rightly brought, it is as a corporation *de facto*, though not *de jure* *State v. Bradford*, 32 Vt. 50; *People v. City of Riverside*, 66 Cal. 288 (5 Pac. 350). In the latter case other California cases are cited justifying that rule. In *State v. Brown*, 31 N. J. Law 355, an action to have it adjudged that a corporation was never legally constituted, it was held that the proceeding must be one that will bring the corporation itself directly before the court. It occurs to me that even in a proceeding to directly test the existence of a corporation, it ought to be a party by its assumed corporate name, as its existence as such is the very thing to be tried—its right to live and act in that name—and that its lawful existence is not admitted simply by impleading it in that name, when the pleading denies it. If so, a suit like this to enjoin taxes assessed in the name of a corporation is more properly brought against it as a party, and it does not estop the plaintiff from contesting its validity, so far as this objection goes.

For reasons stated above, the decree is affirmed.

CHARLESTON.

LOCKHEAD v. BERKELEY SPRINGS WATERWORKS & IMPROVE-
MENT Co. *et al.*

40	553
44	403
40	553
61	524

Submitted January 31, 1895—Decided April 13, 1895.

1. PLEADING—DEMURRER—EXHIBITS.

In passing upon a demurrer to a bill with which written documents are exhibited, as parts thereof, the court is not bound to accept as true and correct the allegations contained in the bill as to what such documents prove, or what is their effect in law, but may look to and go by the documents themselves.

2. MECHANIC'S LIEN—OATH TO MECHANIC'S ACCOUNT.

Chapter 75 of the Code creates the mechanic's lien in certain cases, on certain conditions; and section 4 of such chapter, among other things, provides that such account, to be effectually filed for record as a lien, must be sworn to by the person claiming the lien, or by some person on his behalf. Such oath is an element essential to the creation of the lien, and, to be effectual, must be in writing, as a part in some way, of the paper writing filed for record.

3. MECHANIC'S LIEN—AUTHENTICATION OF OFFICIAL SIGNATURE.

If such affidavit be made before any officer of another state or country, such as the District of Columbia, it is not duly authenticated for record until it is subscribed by such officer, and there be annexed thereto the certificate of the clerk or other officer of a court of record of such state or country, under an official seal, verifying the genuineness of the signature of the first mentioned officer, and his authority to administer an oath. Section 31, chapter 130, of the Code. A case in which these rules are discussed and applied.

FLICK & WESTENHAVER and HENRY R. ELLIOTT for appellant, cited Code, c. 130, s. 31; Id. c. 73, s. 3; Id. c. 73, s. 5; Id. c. 13, s. 4; Id. c. 75, ss. 4, 5; 2 Min. Inst. 864; 8 Gratt. 12; 6 Gratt. 660; Dev. Deeds, § 500; Rev. Stat. D. C. § 916; Rev. Stat. U. S. c. 115, § 2; 1 W. Va. 16; 22 W. Va. 667; 32 W. Va. 174; Dev. Deeds, §§ 473-4-5; 14 Ill. 254; 12 Bush. 408; 1 Am. & Eng. Enc. Law 1020; Dev. Deeds 502; 13 Peters 17; 7 Watts. 334; 1 Dev. & Bat. Eq. 7; 8 Greenl. Ev. § 383; Danl.

Ch. Prac. p. 892; 6 Veasey 823; 13 W. R. 128; 8 East 364; 1 Peters 368; 26 W. Va. 807; 7 W. Va. 569.

W. H. TRAVERS for appellee, cited Code, c. 50, s. 4; Id. c. 73, s. 3; Id. c. 75, ss. 2, 4, 7; Id. c. 130, s. 31; Code (Va.) c. 176, s. 27; 115 U. S. 122; 7 W. Va. 467; Id 415; 13 Peters 17; 32 Am. Dec. 765; Phillips Mechs. Liens § 366.

HOLT, PRESIDENT:

The bill in this case was filed in the Circuit Court of Morgan county for the enforcement of a mechanic's lien, under chapter 75 of the Code. There was a demurrer to the bill, which was sustained by the court; and the plaintiff expressing no desire to amend, the bill was dismissed, and this appeal has been allowed.

The decree sustaining the demurrer is the one error complained of. The main ground of demurrer was that the mechanic's lien had not been sworn to, and the oath certified, as required by statute. The bill alleges that the plaintiff made the affidavit required by statute, and on the 29th day of June, 1894, he had the same admitted to record in the clerk's office of the County Court of Morgan county. A copy of the mechanic's lien, with the affidavit therein, is filed as an exhibit with the bill.

Under the provision of section 4, chapter 75, of the Code, the party claiming a lien "shall within sixty days after he ceases to labor on or furnish material or machinery for such building or other structure, file with the clerk of the county court of the county, in which the same is situated, a just and true account of the amount due him, after allowing all credits, together with a description of the property intended to be covered by the lien, sufficiently accurate for identification, with the name of the owner or owners of the property, if known, which account shall be sworn to by the person claiming the lien, or some person in his behalf."

The affidavit is as follows: "District of Columbia, City of Washington—ss.,"—and signed, "James Lockhead," and concludes with the following certificate: "Subscribed and sworn to before me this 28th day of June, A. D. 1894. J. R.

Young, Clerk Supreme Court, D. C. (with the seal of the Supreme Court of the District of Columbia) by M. A. Chancey, Assistant Clerk."

The case in hand has been argued by counsel as depending upon the true construction of section 31 of chapter 130 of the Code, regulating certain matters of evidence, which is as follows: "In any case in which an oath might be administered by, or an affidavit made before, a justice, the same may be done by or before a county commissioner, notary public, or a commissioner appointed by the governor, or by a court or the clerk thereof; or in case of a survey directed by a court in a case therein pending, by or before the surveyor directed to execute said order of survey. An affidavit may also be made before any officer of another state or country authorized by its law to administer an oath, and shall be deemed duly authenticated if it be subscribed by such officer, and there be annexed to it a certificate of the clerk or other officer of a court of record of such state or country, under an official seal, verifying the genuineness of the signature of the first mentioned officer, and his authority to administer an oath." It must be read in connection with section 4 of chapter 50, which reads as follows: "Where any oath may lawfully be administered, or affidavit or deposition taken within any county, it may be done by a justice therein, unless otherwise expressly provided by law."

1. It will be seen that section 31 of chapter 130 seems to be divided into two clauses, providing for two classes of cases. This law had its inception as section 3 of chapter 65 of the act of March 6, 1841 (see Acts 1840-41, p. 76) which reads as follows: "That in all cases when by law the affidavit of any person residing in another state of the United States or any district or territory thereof, or in any foreign country is required or may be necessary in any judicial proceeding in this state, the same shall be deemed duly and properly authenticated if subscribed and taken before some officer of such state, district or territory, or foreign country, authorized by the laws thereof to administer an oath or affirmation, and shall have annexed thereto a certificate of the clerk or other proper officer of a court of record of such

state, district or territory or foreign country under the seal of such court, if there be a seal, or of any of the officers or agents before mentioned, verifying the genuineness of the signature of said officer, the existence of such office and the authority of such officer to administer an oath or affirmation." The officers and agents before mentioned in the act are "all American ministers plenipotentiary, charges d'affaires, consuls-general, consuls, vice-consuls, and commercial agents, duly appointed and recognized in any foreign country." Chapter 57 of the act of 14th February, 1844 (see Acts 1843-44, p. 52) authorized the governor to appoint and commission in each of the other states, in the territories, and in the District of Columbia, one or more commissioners, with authority to take acknowledgments and proof of deeds, *etc.*; and section three of the chapter provides as follows: "Every commissioner appointed by this act shall have full power and authority to administer all lawful oaths and affirmations, and his certificate of the same shall have the same effect in the courts of the commonwealth as the certificates of judges, justices and commissioners in this commonwealth." The act of April 4, 1848 (Acts 1847-48, p. 61) provided that notaries public should have the same right and power to administer oaths in all cases which justices of the peace now have and exercise, and their certificates and seals shall be entitled to the same faith and credit as those of justices of the peace. Then came the revisal of the Code of 1849. See report of Revisers of 1849 (page 866). Down to this time the modes of authentication of oaths by domestic and foreign and *quasi* foreign officers were separate and distinct. The latter clause, as it now stands, mentioned the District, and, putting it in the same class with foreign countries proper, required an additional certificate, verifying the genuineness of the signature of the foreign officer, taking and certifying the oath, the existence of such office, and the authority of such officer to administer an oath or affirmation. The revisers of 1849 put the section in its present form, including the methods of authentication by state and county officers in the first clause, and the method of authentication by foreign and *quasi* foreign officers in the last or

second clause. See section 26, chapter 176, p. 665, Code 1849. It was amended and re-enacted by the act of December 21, 1859 (see Acts 1859-60, p. 139) so as to read as we find it in the edition of 1860 of the Code of 1849 (see Code 1860, s. 27, c. 176, p. 726) which, for the purpose now in hand, is the same as we now have it in this state by section 31, chapter 130, Code 1891, p. 827.

2. Not only does the history of the enactment in question tend to show that the first clause of section 31 of chapter 130 is confined to authentication of oaths taken and certified by state and county officers, and that the second clause is confined to the mode of authentication of oaths taken and certified by officers of all other states and countries including the District of Columbia, but I think such is the fair reading and meaning of the section, by its own language and terms. For we see that all the officers mentioned in the first clause are unequivocally state or county officers, unless it be the notary public, and the court or the clerk thereof; and as to those there can be no doubt, when we consider the history of the enactment, and its present apparent classification of domestic and foreign officers, but especially when we consider that the extent of the authority of the justice is made the measure of the authority of all the others named in this first class, for his authority, we see by section 4 of chapter 50, is limited to his state and county, and so we must regard the notaries public and courts and clerks mentioned as being state and county officers and tribunals; and the commissioner appointed by the governor for another state is, of course, an officer of this state.

3. The reason and purpose of the law, as founded upon the state of facts leading to the enactment of the requirement of an additional and supplementary certificate of authentication in the latter class of cases which does not exist in the other, also tend to justify the same construction. Heretofore the general rule prevailed that the law, written or unwritten, of a foreign state or country, had to be proved as a fact; but now, by section 4 of chapter 13 of the Code, the courts of this state shall take judicial notice of the laws of another state and country, whenever material, and

would be thus informed that a certain class of officers are authorized by the laws of the District of Columbia to administer an oath. But they would still need to be certified in some way that the officer in question belonged to such class, and that his signature was genuine, so that some of the reasons that occasioned the law still exist. And, even if that could have any bearing, no part of the certificate has been dispensed with, but the law-maker has seen fit to preserve it intact, notwithstanding the enactment of section 4 of chapter 13 of the Code of 1868, as borrowed from the New York Code of Procedure. *Parker v. Clark* (1874) 7 W. Va. 467, and *Dickinson v. Railroad Co., Id.* 390, are the only cases cited, and the only ones I have been able to find in our Reports, bearing in any degree upon this point. There the authority of the clerk of the district court of the United States for the district of West Virginia to administer an oath under the first clause of section 31 of chapter 130 (section 27 of chapter 176, Ed. 1860) of the Code of Virginia is expressly put upon the ground that he was the clerk of a court holding and exercising jurisdiction within the limits of this state. These courts are, in some respects enumerated, recognized as courts of the state and are therefore within the meaning of the term "by a court or the clerk of any court," as used in the first clause of section 27 of chapter 176 of the Code (Ed. 1860) of Virginia. And in *Dickinson v. Railroad Co., 7 W. Va. 390*, such United States district court held within this state is held to be a local court of the state, within the meaning of section 5 of chapter 130 of the Code of 1868, and not within the meaning of section 19 of chapter 130 of such Code. The clerk in this case was considered an officer of a domestic federal court, and therefore within the reason and meaning of the first clause of the section; and for that reason there was not needed to be annexed thereto any certificate under an official seal of a court of record, verifying the genuineness of the signature of the first mentioned officer, and his authority to administer an oath, as would have been needed had such clerk been held to be an officer of another state or country, authorized by its laws to administer an oath. And the terms in the latter clause,

"any officer of another state or country," are used in contradistinction to the officers mentioned in the first clause, and therefore import that such officers, so mentioned by name, are domestic officers of the state and countries, and further are, in effect, equivalent to saying all officers of another state or country, authorized by its laws to administer an oath, must have the genuineness of their signatures, and their authority to administer an oath by the laws of their respective states or countries, verified by the additional certificate annexed thereto of the clerk or other officer of a court of record of such state or country, under an official seal.

But the bill alleges that the plaintiff made the affidavit required by statute. Must this allegation be taken to be true on demurrer, when the copy of the paper filed and recorded as his mechanic's lien is exhibited as a part of his bill, and may show such allegation not to be true? Such documentary evidence exhibited with and made part of the bill must at some time be read, and its legal effect, and the fact it proves, be determined by the court. The modern rule is that this may be done in passing upon the demurrer, and the court is not bound to accept as true for such purpose the allegation contained in the bill as to what fact the paper proves, or what is its effect in law. See 1 Beach, Mod. Eq. Prac. § 229; *Interstate Land Co. v. Maxwell Land-Grant Co.*, 139 U. S. 569 (11 Sup. Ct. 656); *Dillon v. Barnard*, 21 Wall. 430; *Lea v. Robeson*, 12 Gray 280.

The court will, on demurrer, construe the instrument for the pleader. See *North v. Kizer*, 72 Ill. 172. In our practice it is no longer an open question. *Bias v. Vickers*, 27 W. Va. 456. This leads to no inconvenience, as the court may, in one or more ways, when there is proper occasion for it, hold the ultimate decision of the demurrer in suspense until a further or the final hearing. See 1 Barb Ch. Prac. 345; 4 Minor Inst. 1146; *Pryor v. Adams*, 1 Call 391. For collection of authorities, and discussion of general subject, see *Kester v. Lyon* (20 S. E. Rep. 934), 40 W. Va. 161.

Another point made by counsel for appellant is: "Conceding for the sake of argument, that the certificate annex-

ed to the affidavit to the account filed in the clerk's office does not contain all that section 31 of chapter 130 requires, yet it does show that the affidavit was made before an officer who the court judicially knows has authority to administer an oath, yet the fact of such authority, and the genuineness of his signature, may be proved by parol or otherwise by evidence *aliunde* at the hearing of the cause. They say that the paper (the copy of the mechanic's lien account) filed as an exhibit with the bill purports, upon its face, to have been sworn to by the plaintiff, the lienor; the bill alleges that he made up a just and true account of the amount due to him from said company, with a description of the property intended to be covered by the lien, made the affidavit thereto required by the statute, and on the 29th day of June, 1894. filed, and had the same admitted to record; that this was sufficient to require the overruling of the demurrer; that the objections to the affidavit, even if well founded, go, not to the substance of the act, but merely to the proof furnished; that it had been sworn to—in other words, the authentication of the genuineness of the clerk's, or of the assistant clerk's signature, and his authority to administer an oath, is defective. To authenticate a writing is to perform certain acts upon it for the purpose of rendering it admissible in evidence as being what it purports to be, without proof by witnesses that it is such. Authentication is then merely a convenient method of furnishing proof of certain things. When, therefore, the section in question says an affidavit will be sufficiently authenticated in a certain form, verifying the genuineness of the signature and the authority of the person administering the oath, it simply means this is one method of making the affidavit admissible in the evidence without other proof of such genuineness and such authority. It does not purport to be the only, or an exclusive method. Nor does it follow that if the oath was in fact lawfully administered, if the affidavit was in fact duly made, it shall be of no effect because the officer has neglected to avail himself of the most convenient method of making it admissible in evidence without other proof. Consequently, parol evidence might be introduced at the hearing both as

to the genuineness of the signature of the clerk, or the assistant clerk, and of his authority to administer an oath. Such authority the court knew, by having, under our statute, judicial knowledge thereof, and the genuineness of the signature it also sufficiently knew, by virtue of taking as true on the demurrer the allegation of the bill to the effect that the mechanic's lien had been duly sworn to. The case was, therefore, when heard below, completely rounded out on all sides." And the cases of *Van Ness v. Bank*, 13 Pet. 17, and *Bennett v. Paine*, 7 Watts 334, are cited as illustrations of the doctrine applied in analogous cases and *Omealy v. Newell* (1807) 8 East. 364, as giving the common-law method of supplementary proof or verification in such cases. I do not think these cases apply, nor do I regard this view of the law of this case as tenable, either by the language of the statute, the reason of its enactment, or upon the authorities, as far as I have been able to examine them. Here it is conceded that the statute has named a method. Is it the only method of authentication, or can it be proved in some other way at the hearing? Such contention rests, I think, upon a misconception of the purpose of the authentication, the persons it is intended to satisfy, and the reason of the selection of the method which requires it to appear written upon the face of the claim authorized to be made a lien on being admitted to record. It is intended as a notice of the lien—a creature of the statute—to all whom it may concern. At this important stage the court, with its widespread judicial knowledge or notice of the facts of foreign law, has no concern in the matter. It is a notice, and is not intended by the law-maker to answer the purposes of deciding subsequent demurrers. But the party whom it does concern is not required to take judicial notice of the law of the District of Columbia saying who may administer an oath, but of the statute creating the lien, and there he finds prescribed a method. So that, unfortunately for the argument, the judicial notice of foreign laws, and the concern in the validity of the lien, play somewhat at cross purposes; and for his purpose, when their coming together is important, they are not together, and when they do so come together, as to him.

by the aid of the judicial notice of foreign laws as facts, his misplaced confidence in the record is past recall. For the party whom it may concern, to whom the statute requires the notice to be given wishes to know now the present actual fact of lien or no lien, as already accomplished; and the law-maker intending to cut off and guard against all chance of secret liens in such a case, required such present, actual fact to be a written one, open then and there to his observation and inspection, and to be definite and particular in the creation of a new and otherwise dangerous lien—a peculiarly dangerous lien—prescribed a method of authentication which he was to look for, and must find admitted to record, if it exists at all, and he is required to look there, and nowhere else, for all the essential, determining factors of such ascertainment. “For here real estate in the possession of his debtor, actual or intended, is to be charged with what would otherwise be a secret lien.” *Phil. Mech. Liens* (3d Ed.) §§ 63, 337. Surely, the law-maker did not intend a matter made essential to the existence of the lien to be left at large in any such loose and undetermined attitude that it might stand or fall by words not yet written or spoken; introduced by statutory judicial notice on the hearing of some subsequent demurrer, that there was still another method of authentication, by parol or otherwise, beset in some cases, it might be, with the temptation to supply from uncertain memory, after the event, what was made known to be wanting. This would subvert the purpose and reason of requiring it to be recorded, and the hardship of the rare instance would weigh but little, when put in the balance against such general inconvenience. So the books hold, so far as I have been able to examine them, and, as we have already seen, the letter of the statute is in the very teeth of any such construction.

Where the statute prescribes no method of verification of the signature of the officer before whom the affidavit is made, or of his authority to administer the oath, or if, when a method is mentioned, it does not appear to be restrictive or exclusive, the common-law mode of proof must be in the one case may be in the other resorted to. The common-

law practice was to make affidavit before any officer of a foreign country authorized by its laws to administer the oath in question, and then his signature and authority might at any time be verified by the affidavit of some one cognizant of the fact, made within the realm. *Omealy v. Newell*, 8 East. 364.

In the case of *Van Ness v. Bank* (1839) 13 Pet. 17, the court followed the case of *Connelly v. Bowie* (1823) 6 Har. & J. 141, in holding that where the certificate of acknowledgment of a deed did not state that the persons by whom it was taken were justices of the peace, and there was no evidence in the record to prove their official character, the certificate would be inadmissible, but went further, and held expressly, that evidence *aliunde* was admissible to supply the omission in the certificate indorsed on the deed. In the case of *Bennett v. Paine* (1838) 7 Watts 334, the certificate of acknowledgment contained no assertion of magisterial character. It was not affirmative of either office or place, and the court held that proof of the existence of the magisterial character could be supplied by evidence *aliunde*, and by the common-law methods, as there was no substitution of statutory for the common-law method of proof. This is based upon the general doctrine that where the statute is silent the common-law speaks, but the general rule is equally well settled—that where the statute comes in the common-law is, to that extent, displaced.

Here the statute prescribes a method of giving notice to all whom it may concern, by requiring it to be in writing, and made matter of record, so that the lien created may not be secret, and the inherent nature of the transaction necessarily implies that such method is intended to be exclusive.

Where a statute declares that the notice to create a lien shall be verified before filing, it is essential to the creation of the lien that it should be sworn to in the manner prescribed. The want of verification, or of sufficient verification, is a defect which goes to the whole claim, and can not be amended. "A claim for a mechanic's lien, when filed, should have been verified; and it should appear upon its face to have been verified, before it can be made the basis

of a proceeding to enforce the claim based upon it. If any special form of verification is prescribed, it must be followed." See Phil. Mech. Liens (3d Ed.) §§ 366, 366a, citing *Hallagan v. Herbert*, 2 Daly 253; *Lindsay v. Huth*, 74 Mich. 712 (42 N. W. Rep. 358). In the latter case the notice of lien filed had no verification of any kind. The verification of the demand contemplated by the statute is an oath or affirmation taken and administered by and before an officer having authority by law to administer and certify oaths and affirmations. 2 Jones, Liens § 1451. A verification of the claim substantially as required by statute is essential to its validity. *Id.* See discussion of the subject in *Chandler v. Hanna* (1882) 73 Ala. 390; *Blowpipe Co. v. Spencer* (decided at this term) 40 W. Va. — (21 S. E. Rep. 769).

Our opinion is that in such case what is essential to create the lien, and give notice thereof to the world at large of its being filed for record as such lien, does not exist, efficiently to that end, unless it appears on the face of the paper; that the verification of the genuineness of the signature of the foreign officer before whom the affidavit was made, and his authority to administer an oath, does not in this case so appear by such certificate of the clerk or other officer of a court of record of such state or country, as section 31 of chapter 130 of the Code requires; that the decree sustaining the demurrer was therefore right; and the plaintiff declining to amend, but electing to stand by his bill as he made it, there was nothing the court could do, but dismiss it as on final hearing. Decree affirmed.

CHARLESTON.

McDODRILL *et al.* v. PARDEE & CURTIN LUMBER CO.

Submitted January 29, 1895—Decided April 13, 1895.

1. PLEADING—DECLARATION—DESCRIPTION OF PREMISES—TRESPASS.

In the action of trespass to realty, or an action on the case in

40	564
42	604
40	564
43	541
40	564
447	729
47	730
40	564
60	430
40	564
65	68

lieu thereof under the statute, the place where the acts complained of were done is material and traversable, and the allegations thereof must in some way, either by the name of the land or close, by some or all of its abutments, by naming a particular locality, or in some other way, designate or describe such *locus in quo* with a reasonable degree of definiteness; otherwise the declaration will be bad on demurrer.

2. GUARDIAN AND WARD—WARD'S ESTATE.

Not a guardian by nature, but only a guardian appointed, who has given bond as and when required by law, is entitled to the possession, care, and management of his ward's estate.

3. GUARDIAN AND WARD—INFANT.

An infant who has no such guardian who has given bond may, for damage done to his real estate, sue by next friend.

4. EVIDENCE—DEED—PRIVITY OF SUIT.

Where a deed made under a decree by a commissioner or other authority is offered in evidence as a connecting link in the plaintiff's chain of title to land, it is necessary to introduce with it so much of the record of the suit in which such decree was made as will satisfactorily show that the person having the legal title to the land conveyed was a party to the suit, and as will identify the land conveyed with the land decreed.

5. EVIDENCE—DEED—STRANGER TO DEED

As against a party who claims against the deed and is a stranger thereto, the recital of such facts therein, without more, is not evidence thereof, and the deed does not prove the transfer of the title to the land it purports to convey.

6. CO-TENANTS—WASTE.

Cotenants, who commit waste, are liable to each other jointly or severally for the damages; but the amount of a recovery against a stranger or a grantee of a cotenant must be apportioned to correspond with his undivided interest in the land. A case where these principles are applied.

W. E. HAYMOND for plaintiff in error, cited 6 Rand. 556; 16 Mass. 348; 2 Munf. 282, 336, 518-20; 3 Munf. 273; 12 Leigh (old) 91, 204, 227; 76 Va. 169; 4 Min. Inst. pt. 1, 764-70; 13 W. Va. 160; 24 W. Va. 606; 11 W. Va. 17; 14 W. Va. 157.

ALEX. DULIN, of DULIN & HALL, for defendant in error, cited 8 W. Va. 259; 26 W. Va. 48; 12 W. Va. 1; 21 W. Va. 486; 16 W. Va. 777; 1 Add. Torts (Wood's Ed.) §§ 98, 108, 195, 328-30, 362, 421, 447; 1 Washb. Real Prop. (4th Ed.) top pp. 129, 154 2 Min. Inst. (3d Ed.) top pp. 100, 598-601, 620-22, 631; 2 Tucker's Com. top pp. 186, 192, 193; Code, c. 92; Id. c. 103, s. 8; 6 Rand. 556; 6 Gratt. 301; 9 Gratt. 273; 8 W. Va. 282;

Code, c. 82, s. 18; 10 Am. & Eng. Enc. Law 679-81; 2 Add. Torts, § 1296; 1 Min. Inst. (3d Ed.) top p. 516; 1 Bart. Law Prac. 218, 221, 294, 295; 5 Gratt. 157; 8 Gratt. 6; 28 W. Va. 820; Code, c. 92; 31 W. Va. 621, 632; 1 Black Judgm. §§ 96-99, 101, 105; 28 W. Va. 584; 76 Va. 493; Hutch. Land Titles § 505; 2 Greenl. Ev. § 307.

HOLT, PRESIDENT :

This was an action of trespass on the case, brought in the Circuit Court of Braxton county, by Charles McDodrill and Martha Couger, an infant, suing by McDodrill as her next friend, against the lumber company, a corporation under the laws of the state of West Virginia, for trespasses committed on a certain tract of land, by cutting down and carrying away various growing trees. There was a demurrer overruled; plea of not guilty; trial by a jury; a verdict for plaintiffs for five hundred dollars damages; motion for a new trial, motion in arrest of judgment, both overruled; judgment for plaintiffs; and this writ of error awarded defendant—with all these rulings and others, excepted to there, and assigned as grounds of error here.

First it is said the court erred in overruling the demurrer entered to the declaration as a whole and to each of the four counts. The first two counts aver a trespass committed by defendant in entering upon the lands and premises of plaintiffs and cutting down and carrying away various trees there found growing, and converting and disposing thereof to its own use. The third count avers a cutting down and destroying the saplings and undergrowth, the denudation of the land of all its valuable timber, to the permanent and lasting injury of the same. The fourth and last count avers that plaintiffs are the owners of and invested with the ownership of the immediate remainder in fee in said tract of land, subject to a certain life estate, and makes the same averments of trespass, whereby plaintiffs have been injured and damnified in their estate in remainder in and to said land and premises.

By section 8 of chapter 103 of the Code it is provided that "in any case in which an action of trespass will lie

there may be maintained an action of trespass on the case." And chapter 92 provides, "Section 1: If a tenant of land commit any waste thereon, or after he has aliened it, while he remains in possession, unless by special permission of the owner so to do, he shall be liable to any party injured for damages. Section 2: If a tenant in common, joint tenant, or parcener commit waste, he shall be liable to his cotenants, jointly or severally, for damages. Section 3: If a guardian commit waste of the estate of his ward, he shall be liable to the ward, at the expiration of his guardianship, for the damages. Section 4: Any person entitled to damages in any such case may recover the same in an action on the case. * * *". And by section 14 of chapter 82 any minor entitled to sue may do so by his next friend.

The first point made on the demurrer is that the infant can not sue for such trespass to his lands; it must be brought by the guardian; and for this is cited *Truss v. Old* (1828) 6 Rand (Va.) 556. For a full discussion of the various kinds of guardians and of the common-law doctrine as modified by our statutes, see Minor Inst. c. 17, pp. 460-472, *et seq.* It was held in the above case that guardians in socage and testamentary guardians, although they have no beneficial interest, yet have a legal interest, accompanied with the possession of the ward's land during the guardianship. If, therefore, a person trespass on the lands of an infant, and cut and carry away his trees, without the license of the guardian, the ward can not maintain an action of trespass therefor, but the guardian may; and he must account to the ward for the damage recovered. And section 7 of chapter 82 of the Code provides that "every guardian who shall be appointed as aforesaid and give bond as required shall have the custody of his ward and the possession, care and management of his estate, real and personal." If there be a father, he is guardian by nature; if the father be dead, then the mother succeeds as guardian by nature; and though, as such, charged with the custody of the child's person, and, it may be, with his education, they do not have, as such, the possession or care of his estate. See 1 Minor Inst. p. 472. In such case the doctrine of *Truss v. Old*, 6 Rand (Va.)

556, would not apply, for the reason and foundation of the rule do not exist. Nothing on the face of this declaration shows that the infant has any guardian at all; certainly nothing that she has a guardian who is entitled to the possession and care of her estate; and I know of no rule which requires or authorizes such presumption to be made in passing upon a demurrer to her declaration; and section 4 of chapter 92 of the Code (page 706) provides that "any person entitled to damages in such case (that is, a case of waste) may recover the same in an action on the case."

Is this declaration good in other respects on general demurrer? It seems to have been drawn in the ancient mode of declaring in trespass *quare clausum fregit* with the expectation of making a new assignment. This mode had its origin in the practice which had become general of suing out only general *clausum fregits*. As the law was held to be that upon such general writs the plaintiff either could not at all, or could not to any conclusive effect, count of any close in certain, the mode of declaring generally, pleading the common bar (*i. e.* naming any place as the *locus in quo* and setting up the plea of *liberum tenementum*) and making a new assignment seems to have been universally adopted. See *Martin v. Kesterton* (1776) 2 W. Bl. 1089; 4 Rob. Prac. 584; *Cooke v. Thornton* (1827) 6 Rand. (Va.) 8. But as this practice was circuitous and full of delay, it has been plainly modified, if not done away with, in this state, by section 32 of chapter 125 of the Code.

In such action it is necessary to allege the *locus in quo*, for such fact is plainly traversable; and being necessary to be alleged, it must be given to a reasonable degree of certainty. Here the allegation in the first three counts is that on the — day of —, 1890, at the county of Randolph, state of West Virginia, the said defendant, without the consent or approval of plaintiffs, wrongfully and unjustly entered upon the lands and premises of the plaintiffs, to wit, a tract of three hundred and forty four acres, more or less, of land, situated on Elk run, in Randolph county, West Virginia, and wrongfully, *etc.*, cut down, *etc.*, one hundred poplar trees, *etc.* It is not called the close of any one, or designat-

ed as in the occupation of any one, or given any name or designation, nor metes or bounds of any kind, in whole or in part. Any one or all of these modes of designation would have sufficed, and could have been easily used in this case, as appears in this record, as it appears to be the land conveyed to Lewis Couger, Peter Couger and John Couger by Peter Conrad, by deed dated October 29, 1853, on which Jeremiah Couger then lived. It was known and called the "Jere Couger Place" or "Jere Couger Land," described as on Elk river at the "mouth of the Valley fork." It was so described in plaintiff's McDodrigill's various deeds. The reasons are obvious for requiring, in actions in which the *locus in quo* is of their essence, that it should be designated in the declaration by name, by some of the abutments, or by some other proper description. And I have not been able to find any modern case under any system of pleading anywhere, or any form given, or any book treating of the subject, which would seem to justify so scant and indefinite a description of the place of the alleged trespass as we find in this declaration. I do not regard the fourth and last count as sufficient in this respect, for the description of the *locus in quo* is the same; the only difference is that in the fourth count it is averred that "one Jeremiah Couger was in possession of, and had an estate for and during his natural life in, a tract of land containing three hundred and forty four acres, more or less, lying on Elk river, in Randolph county, West Va., and the plaintiffs were and are now the owners of and vested with the immediate remainder in fee in said land." Here possession is only used to describe his estate, *viz.* that he was seized and possessed of the freehold for life, not that he resided on the land, as a description of the land itself. From the nature of such cases the *locus in quo*—the place—is material and traversable; therefore it can not be omitted, but must be alleged with reasonable certainty of description. Code, c. 125, ss. 32, 34.

The rule of pleading is that the declaration must allege what is required to be proved—that is, the facts constituting the cause of action, with such other allegations as are required for the right understanding of such material al-

legations—with such precision, certainty, and clearness that the defendant, knowing what he is called upon to answer, may be able to plead a direct and unequivocal plea, that the jury may be able to give a complete verdict upon the issue, and the court, consistently with the rules of law, may give a certain and distinct judgment upon the premises. See 1 Chit. Pl. 258.

It needs no bill of exceptions to make the overruling of the demurrer a ground of motion for new trial, for that fact already appears by the record; but as to other matters complained of as error, and as grounds of such motion, they must be made part of the record by bill of exceptions signed by the judge.

At this stage of the case the point is made by the counsel for the defendants in error (plaintiffs below) that the bills of exception are not in such form, and the evidence is not so certified, as to make them parts of the record. This is not made good by an examination of the record, for it is not necessary that there should be a separate bill of exceptions taken and signed to each ruling of opinion of the court; such exceptions, though they may be numerous, may be incorporated into one bill of exceptions. *Snyder v. Railway Co.*, 11 W. Va. 14, 32. In this instance, four bills of exception, each complete within itself, are numbered and set forth *seriatim*, conjointly, in one bill, which is signed as the signature of each, and made part of the record. The court evidently anticipated something of this sort, and, following the analogy of a joint and several bond, made each one of the four bills several, and each one a part of every other. Then follows: "The court certifies the following evidence introduced upon the trial of the above cause." Then follows the evidence, and the certificate closes as follows: "And there was no other evidence introduced on said trial (except there was evidence tending to corroborate the plaintiff's evidence as to possession) and the same is certified and made part of the record in this cause"—signed by the judge presiding, which certificate is referred to in the bill of exceptions, and the order book notes the taking thereof, and making the same a part of the record. I do not see what

else could be required to be done to make them parts of the record. See *Wickes v. Railroad Co.*, 14 W. Va. 157.

From the certificate of evidence the following facts appear: The tract of land on which the alleged trespasses were committed calls to contain three hundred and forty four acres, is situate in Randolph county, on Elk river, at the mouth of the Valley fork. Peter Conrad, by deed dated 29th day of October, 1853, conveyed the same to Lewis Couger, Peter Couger and John Couger in fee, subject to a life estate in their father, Jeremiah Couger, who was then living on it, and still lives on it. This deed recites that it is the same land which was conveyed to Peter Conrad by David Goff, commissioner, by deed dated 3d November, 1836, and duly recorded. Lewis Couger died unmarried, and without children, about 1861-65, leaving his father, Jeremiah Couger, his heir at law. About the year 1867 or 1868 plaintiff Charles McDodrill, as he claims, brought suit against Lewis Couger's administrator and his heir, namely, his father, Jeremiah Couger, to enforce payment of a bond of one hundred dollars against Lewis Couger's estate. Such proceedings were had that the Circuit Court of Randolph county, by decree entered on the 22d day of August, 1868, directed a sale of the reversionary interest of Lewis Couger in the tract of land in the bill and proceedings mentioned, and appointed Joseph A. Thompson a special commissioner to make such sale. On the 24th day of August, 1869, he made sale thereof to plaintiff McDodrill for the sum of two hundred and thirty one dollars, and reported the sale to court; and the court, by decree entered on the 9th day of November, 1871, confirmed the sale and appointed Thompson commissioner to convey the same to the purchaser upon payment of the balance of the purchase-money. This being paid by McDodrill, Thompson, as commissioner, by deed dated October 1, 1872, reciting these facts and decrees, conveyed the same to McDodrill, which deed was duly admitted to record on the same day.

Plaintiffs also proved by W. H. Wilson, clerk of the Circuit Court of Randolph county, and, as such, keeper of its records, that he had made careful and diligent search on

three different occasions for the bill and papers in said cause in his office, and was unable to find them, but he had never seen the bill or papers at any time. The original decree entered on the first hearing is not introduced. The court permitted the deed from Commissioner Thompson and these three copies of decrees to be read in evidence on behalf of plaintiffs against the objection of defendant. This is defendant's ground of error No. 2.

Where a deed made under a decree by a commissioner or other authority is offered in evidence as a connecting link of the party's claim of title to land it is necessary to introduce with it so much of the record of the suit in which such decree was made as will satisfactorily show that the persons having the legal title to the land conveyed were parties to the suit, and as will identify the land. *Waggoner v. Wolfe*, 28 W. Va. 820. In that case, as in this, it was proved by the clerk that the file of papers was lost. Here the recitals in the commissioner's deed made in pursuance of the decree state that the chancery suit was pending in the Circuit Court of Randolph county, in which the said Charles McDodrill was plaintiff and John M. Phares, administrator of Lewis Couger, Jr., deceased, and Jeremiah Couger and Joseph E. McDodrill were defendants. The oral evidence shows that the said Jeremiah Couger was the father and only heir at law of Lewis Couger, who died intestate, unmarried and childless, seized and possessed in fee simple of an undivided third of the tract of land in question, subject to the life estate of his father, the said Jeremiah. The deed of Commissioner Thompson and the decrees were at that stage provisionally admissible in evidence as color of title, and were therefore competent evidence. Whether the legal effect of the deed was to transfer the legal title presents a different question.

Plaintiffs also showed that some years ago Peter Couger, one of three grantees of this land by the deed of Peter Conrad, departed this life, leaving as children and his heirs at law the infant plaintiff Martha Couger, and also the following: George W. Couger, who conveyed his interest to plaintiff McDodrill by deed dated the 28th day of January,

1891; Debby J., wife of James M. Jackson, who conveyed to McDodrill their interest by deed dated the 15th day of March, 1890; Minerva A., wife of Joseph Daft, who conveyed to McDodrill their interest by deed dated 13th day of May, 1889. So that plaintiff McDodrill had all the interest of Peter Couger except that of his infant co-plaintiff. Plaintiff McDodrill also introduced in evidence a deed of special warranty to himself from John Couger, dated the 17th day of March, 1890, for all his right, title, interest, claim and demand in this tract of land, he being one of the three grantees from Peter Conrad. But John Couger had, by deed dated on the 19th day of January, 1889, duly acknowledged and admitted to record in the clerk's office of the county court of Randolph county, sold to George W. Curtin, a member of the defendant corporation, for the sum of forty dollars in hand paid, thirty two of the trees in controversy, and his father, Jeremiah Couger, the life tenant, and in one view the owner in fee of an undivided third, then in actual possession, by deed dated the 2d day of February, 1889, duly acknowledged and admitted to record on the 13th day of May, 1889, for the sum of fifty six dollars and twenty five cents sold to said Curtin forty five standing trees, the remainder of the subject of controversy. No time was fixed in either contract within which the trees were to be cut and taken away; therefore they had a reasonable time. *Hanly v. Waterson*, 39 W. Va. 214 (19 S. E. Rep. 536). But full rights of way over the land were given, and the trees were afterwards cut and taken away by defendant and sawed, making one hundred and thirteen thousand eight hundred and sixty four feet board measure. These trees, as they stood on the ground, were shown by plaintiff's evidence to be worth from five dollars per one thousand board measure, up to fifteen dollars per tree; by defendant's evidence, to be worth from one dollar and twenty five cents to one dollar and fifty cents per standing tree. Jeremiah Couger, the life tenant, was at the time in possession of the land under the Peter Conrad deed, and had been in actual possession under such claim continuously for at least thirty seven years, and since the death of his son, Lewis, as owner in fee of one third of

it. 'There was no evidence that the land had ever been granted by the commonwealth or state to any one.

The ground of error No. 3 is that the court overruled defendant's motion to exclude all the evidence of plaintiffs on the ground that no grant from the commonwealth was shown, no color of title ripened into a perfect one by adversary possession, no right of recovery on any ground shown on behalf of plaintiffs. We have already seen that the deed of Commissioner Thompson was admissible at that point in the case provisionally—was admissible as giving color of title to his claim of ownership, and showing the nature, the boundaries, and extent of such claim. Whether it was sufficient to show a divesting of the heir of and the investing of the purchaser with the legal title will be considered under another head. In such refusal of the court there was no error, for the following reasons: (1) Plaintiffs and defendant derive title to the trees from a common source. In such case the plaintiff need not trace his title back beyond such common fountain, from which both claims of ownership emanate. *Boiling v. Teel*, 76 Va. 493; *Newell, Eject.* p. 485. (2) It is not a suit to try adverse titles to the land, but an action on the case by the remainder-man for waste committed, to the permanent injury of his interest in the freehold; the tenant for life being in actual possession. (3) Even as against the state, under our statute, the Cougar title has been perfected by length of continuous actual possession under the Peter Conrad deed; for, by section 20 of chapter 35 of the Code, "every statute of limitation, unless otherwise expressly provided, shall apply to the state." And the estate of the life tenant, of which he is seized by such actual possession, and the estate in fee simple in remainder, constitute but one freehold in law; and therefore such possession of the life tenant, so far as it perfects his own title, inures in the same way to the benefit of those entitled in remainder. (4) And what plaintiffs sought for could only have been given, under the circumstances, by instruction given to the jury, or withdrawing the deed of the commissioner, and not by taking the case from them entirely, for there was no controversy that plaintiff McDodrigill

was the owner by legal title of some undivided part of the land. And now, as already intimated, it becomes necessary to regard the life tenant Jeremiah Couger, as invested, under the statutes of descent, with the legal title to one third of the remainder in fee, as the heir at law of his son, Lewis Couger, who died intestate, unmarried and childless, about the time of the war in 1862, and as one of the cotenants, for such, in the record as it stands, he appears to be. As to the bill and file of papers in the chancery cause entitled, at the head of the decree, "Charles McDodrigill, Complainant v. Lewis Couger's Adm'rs, Defts. In the Circuit Court of Randolph county." the clerk of that court testifies that he has searched for it, and can not find it; that on the 12th day of August, 1893, he had been clerk nine years, and had never at any time seen the bill or file of papers. The first decree is not produced. The one entered on the 22d day of August, 1868, begins, "This cause came on again to be heard upon the papers formerly read." Neither one of the three shows by recital or in any way that Jeremiah Couger was a party to the suit, or had anything to do with it; and the administrator does not represent the real estate. The defendant claims under the grant of timber made by Jeremiah Couger to George W. Curtin, so that the effect of the commissioner's deed to transfer the legal title from Jeremiah Couger, as the heir at law of Lewis Couger deceased, is directly involved and put in issue in this suit. The deed of Commissioner Thompson does recite that Jeremiah Couger was a party defendant in the suit, but such recital in the deed, by itself, is clearly insufficient to show that Jeremiah Couger was a party to the suit, as against him and those claiming under him, where the transfer of the legal title is directly brought in question; and both, being strangers to the deed, are not bound by its recitals. To hold otherwise would be proving in a circle. He was a party to the suit; therefore he is privy to the deed. Being privy to the deed, its recitals are competent evidence against him and his grantee. The recitals being competent evidence, they state that Jeremiah Couger was a party to the suit; therefore the effect of the commissioner's deed was to di-

vest Jeremiah Couger of the legal title. See *Wiley v. Gircns*, 6 Gratt. 277; *Walton v. Hale*, 9 Gratt. 194; *Bower v. McCormick*, 23 Gratt. 310, 327.

It is a well established principle that in adversary proceedings in a court of equity for the sale of land nothing but the title which is vested in the parties to the proceeding can be sold; and a deed made under a decree in such proceedings carries with it only the title of the parties to the suit. *Adams v. Alkire*, 20 W. Va. 480; *Waggoner v. Wolfe*, 28 W. Va. 820. See *Hall v. Hall*, 12 W. Va. 1. And where the fact whether one was a party to such suit is brought into question directly, and not simply on some collateral proceeding, a recital in the deed made by the commissioner, professing to convey the land in question, is in and of itself not sufficient evidence that the court directing the deed to be made had jurisdiction of the person. In this state the administrator does not represent the land; the heir at law must be before the court. The remarkable fact about this case is that the decrees introduced recite that the administrator of Lewis Couger is a party, but nowhere is there any mention of Jeremiah Couger, the heir at law, being a party. We would naturally look for it in the decree entered on the first hearing of the cause. The non-production of a copy of that decree justifies the inference that it would do the plaintiff's title no good. Our records show that proceedings have been had in this state to sell by decree the real assets with no one before the court but the administrator, and such decrees have been held to be mere nullities as against the heir. Whatever be the cause, the non-production of a copy of the first decree can not but attract observation. For a summary of the general principles governing jurisdictional inquiries, see *Freem. Judgm.* § 124; *Freem. Jud. Sales*, § 8; *Newell, Eject.* § 87 *et seq.*, p. 489.

At this stage of the case, after the evidence was all in, and the court was called on to instruct the jury, this deed of Commissioner Thompson should have been withdrawn by the court as evidence, or at least the jury should have been expressly instructed as to its legal effect—that is, that it did not operate as a transfer of the legal title; especially as

the counsel for defendant had asked that it should be stricken out as evidence, or not be considered by the jury. That this was error to the prejudice of the defendant below (plaintiff here) plainly appears by what follows, for such exclusion ought also to have had the effect to limit to that extent the amount of plaintiff's recovery; and because it showed that Jeremiah Couger, who now appeared to be one of the co-owners of the reversionary interest, had not been joined as a plaintiff; and the court instructed the jury, on motion of defendant, that unless all the co-owners were so joined there could be no recovery in such an action as this. These instructions given for defendant are as follows (1) "The court instructs the jury that the burden is on the plaintiffs to establish their right by satisfactory proof, and unless the plaintiffs have established their title to the satisfaction of the jury, the verdict should be for defendant." (2) "The court further instructs the jury that unless all the co-owners of the reversionary interest join as plaintiffs, there can be no recovery in such action as this." Of course, these instructions would have been properly modified had the court been led to take the above view of the legal effect of the commissioner's deed.

Defendant's fourth assignment of error is based on the giving by the court on motion of plaintiffs, and against the objection of defendant the following four instructions: "No. 1: The court instructs the jury that the deed from Peter Conrad to Lewis Couger, Peter Couger, and John Couger did not confer upon Jeremiah Couger the right to cut and remove from the land therein mentioned the marketable timber thereon, or to sell and dispose of the same for the purpose of removal from said land; and that the contract between Jeremiah Couger and George W. Curtin did not confer upon the said Curtin, or any one claiming under him, the right to cut and remove from said land any of the marketable timber thereon. No. 2: The court instructs the jury that one tenant in common or joint tenant has no authority without the consent of his cotenant, to commit waste on the lands owned by them, by cutting and removing therefrom the marketable timber thereon, or to authorize another

so to do. No. 3: The court instructs the jury that a person holding a life estate in land has no right or authority to cut or remove therefrom the valuable and marketable timber thereon, nor can he confer such authority upon a stranger without the consent of the persons owning the immediate remainder in fee; and the persons owning the immediate remainder in fee are not authorized to cut and remove from said land said timber before the life estate is terminated, without the consent of the person owning the life estate. No. 4: If the jury believe from the evidence that the defendant cut and removed and converted to its own use any of the marketable timber on the land in the declaration mentioned, and that at that time the plaintiffs were the owners in fee of the said land, subject to the life estate therein of Jeremiah Couger, then the defendant was not authorized, by the contract read in evidence between Jeremiah Couger and George W. Curtin and John Couger and George W. Curtin, to cut and remove the said timber without the consent of the plaintiffs, and if the same was done without consent, the plaintiffs are entitled to recover from the defendants such damages as they have sustained by reason of such cutting and removal of timber; and in ascertaining such damages the jury have the right to take into consideration not only the value of said timber, but the permanent injury occasioned to the said land by reason of the cutting and removal thereof." These instructions, as we see, cover the point that the evidence tended to raise of waste on the part of a life tenant or his grantee as against the remainder-men who were cotenants in fee, and of waste committed by such remainder-men, being cotenants, as between each other; but not the case of a life tenant of the whole and a co-owner of an undivided third of the immediate remainder in fee. If the learned judge who tried the case below had been able to give the point involving the legal effect of the deed of Commissioner Thompson more mature consideration, he would have been led to modify these instructions also so as to meet that aspect of the case. He treated standing timber trees as part of the realty—this, as a general rule, is well settled (*Schulenberg v. Harriman*, 21 Wall. 64)—and correctly instructed the

jury that the life tenant had no right to cut and remove such timber without the consent of those in remainder. The tenant for life has the common right of all tenants to cut wood for fuel to burn in the house, for the making and repairing of all instruments of husbandry and of fences, but not to sell the timber, although the proceeds be applied to repairs. See 2 Minor, Inst. pp. 100, 101; Lomax Dig. p. 60; Williams, Real Prop. (Am. Notes, p. 148; 17th Internat. Ed.) p. 127. Still the land in question was for the most part in woods. It was certainly intended that the life tenant might clear, for the purpose of farming, to any extent he saw fit, provided he left wood and timber enough for the permanent use of the farm. See *Jackson v. Brownson*, 7 Johns. 227. The deed conveying the land has this in conclusion: "And it is understood strictly that Jeremiah Couger is to have the use and control of said land during his natural life, and then to go to the aforesaid Lewis, Peter, and John Couger." In this state the law of waste must be so viewed as to accommodate it to circumstances of a new and unsettled country. *Findlay v. Smith* (1818) 6 Munf. 134. See *Macaulay v. Land Co.* (1843) 2 Rob. (Va.) 507, 527. If the life estate were ended, each and every cotenant would have the right to take possession peaceably, and have the reasonable enjoyment thereof in some of the ordinary methods of reaping profits from property of like character under like circumstances. Freem. Coten. § 251; *Hawley v. Clowes*, 2 Johns. Ch. 122. Thus, if timber standing on the land is of proper size and condition for advantageous sale, either of the cotenants, it is said, may lawfully proceed to cut and sell it; for in so doing he makes no unusual use of the real estate of which he is a tenant in fee. Freem. Coten. § 251. *Baker v. Wheeler* (1832) 8 Wend. 505, 24 Am. Dec. 66, and note, was an action of trover, where it is held, *inter alia*, that license by one tenant in common to a third person to cut timber on the common land is good, and gives such person title to the trees cut. The note is quite a full discussion of the measure of damages in such cases. *Bradley v. Boynton* (1843) 22 Me. 291; *Alford v. Bradeen* (1865) 1 Nev. 230; *Hihn v. Peck*, (1861) 18 Cal. 641, on injunction affirmed in *Carpentier v. Webster*, July 3,

1868, not reported. As to quicksilver mine, see *McCord v. Mining Co.* (1883) 64 Cal. 135, where there is a full discussion of the general subject. One tenant in common can not maintain an action on the case in the nature of waste against another tenant in common in possession of the whole, having a demise of the moiety from the first, for cutting down trees of a proper age and growth for being cut. *Martyn v. Knowllys* (1799) 8 Term. R. 145; 1 Taunt. 241.

The mere act of selling the standing timber was not waste. They were sales and grants by deed of some interest in the realty, and, being duly recorded in the proper county, had the effect of notice to all subsequent purchasers; so that such purchaser took it subject to such rights, whatever they may be. The subsequent cutting of the timber constituted the waste, if any, which involves different questions; and in any event the plaintiffs would be entitled to recover only their proportionate part of the damages, measured by the quantity of their interest in the timber cut and carried away. See *Freem. Coten.* § 356; *Carpenter v. Small*, 35 Cal. 346; *Cain v. Wright* (1858) 5 Jones (N. C.) 282, 72 Am. Dec. 551. In fact, I think this is included in the meaning of our statute on the subject of waste between cotenants (section 2 of chapter 92 of the Code). The jury evidently included in their verdict damages for all and the whole of the trees cut, in the interest of Jeremiah Couger and of John Couger, who had sold the trees to defendants.

The propriety of limiting such recovery of the cotenant to an amount in damages proportionate to his interest in the land may receive some further indirect confirmation from section 14 of chapter 100 of the Code, which, among other things, provides that an action of account may be maintained by one joint tenant, or tenant in common, or his personal representative, against the other, for receiving more than comes to his just share or proportion, and against the personal representative of any such joint tenant or tenant in common. And if the property admits of use and occupation by several, and less than his just and proportionate share of the common property is used by the occupying cotenant, who in no way hinders or excludes the others, he is not ac-

countable to his cotenants for the profits of that portion of the property owned by him within the meaning of this statute. *Dodson v. Hays*, 29 W. Va. 577 (2 S. E. Rep. 415). But here the estate for life was not ended, and an undivided third interest in the immediate remainder in fee had, by our statute of descent, come to the father, the tenant for life. I take for granted that by operation of the law of merger an undivided third of the life tenant's freehold was thereby enlarged to a fee; but that such union of such part of his particular estate with such part of the immediate remainder in fee came to him by descent did not operate in any way to defeat, impair or otherwise affect his own particular estate or the remainder. If it had the effect to merge the life tenant's whole legal estate, then it would be to be held for the use of the life tenant for life. See section 13, chapter 71, of the Code; *Scott v. Scott* (1868) 18 Gratt. 150, 160; *Wiscot's Case* (1599) 2 Coke, 61; *Crumpp v. Norwood*, 7 Taunt. 362, goes to sustain the first view, and it would not affect the creditors of Lewis Couger, deceased, otherwise than as provided by section 5 of chapter 86 of the Code, making the heir liable to those entitled as creditors for the value thereof, with interest; and we see that he did by deed sell to defendant part of the standing timber trees here in controversy, which might have some bearing upon the case as to the remedy, and as to what would have been his liability, and what is the liability of his vendee growing out of his relation as life tenant to the owners of the remainder in fee, as governed by the doctrine of waste.

The fifth ground assigned is overruling defendant's motion to set aside the verdict and grant a new trial for the errors already assigned, specifying them, and also as contrary to law and the evidence. This was followed by a motion in arrest of judgment, made and overruled at the same time. "Arrests of judgment arise from intrinsic causes appearing on the face of the record, * * * as where the verdict materially differs from the pleadings and issue thereon, * * * or if the case laid in the declaration is not sufficient to found an action upon"; and this has already been considered in discussing the demurrer. "And it is an inva-

riable rule that whatever matter of law is alleged in arrest of judgment must be such matter as would, upon demurrer, have been sufficient to overturn the action or plea." 3 Bl. Comm. 394. The verdict for the plaintiffs is general on the plea of not guilty. There is no special finding that differs from the pleadings and issue; so that in this case there was no ground for motion in arrest of judgment that was not covered by the motion for a new trial, and also by the demurrer. This fifth ground of error need not be further discussed, for we have already seen that the demurrer to the declaration should have been sustained, not because it appears upon its face that one of the plaintiffs is an infant, therefore can not sue—for, as to the first three counts, we can not presume that she has a guardian who has been appointed and given bond as required by law before he is entitled to the possession of his ward's estate, and as to the fourth and last count we are inclined to think that she can bring an action on the case for damages to her estate in remainder—but because the *locus in quo*, the place where the act was done, is a material and traversable allegation, and should, therefore, be alleged with some reasonable degree of certainty and definiteness of designation. We have also seen that, as the evidence stood at its close, it was error to leave the deed of Special Commissioner Thompson to plaintiff C. McDodrigill in evidence before the jury at all, or at least without having instructed them that it did not have the effect of transferring the legal title, and also without having adapted the other instructions given to such a state of facts.

Therefore the judgment complained of must be reversed, and proceeding to give such judgment as the Circuit Court ought to have given, the verdict is set aside, and the cause remanded for a new trial.

CHARLESTON.

ROBINSON v. WEST VIRGINIA & P. R. Co.

Submitted January 29, 1895—Decided April 13, 1895.

1. CONTRIBUTORY NEGLIGENCE—RAILROAD COMPANY—NEGLIGENCE.

An engineer runs his train on a sixteen degree curve, at a high rate of speed for such a curve, and against the express orders to him of the railroad company, requiring him at that place to go slow. The engine, with four cars, leaves the track, whereby the engineer is killed. There is some evidence tending to show that the outer rail of the curve is not higher than the inner one. Outside of mere conjecture, this is all that is known of the cause of the accident. There can be no recovery against the company for negligently causing his death; for it thus appears that, if the lowness of the outer rail was a cause of the accident, his own want of due care, and his violation of orders contributed to cause the same.

2. EVIDENCE—VERDICT.

A verdict based alone on mere conjecture, without evidence to support it, where the rule as to the burden of proof requires some reliable affirmative evidence, should not be permitted to stand.

3. CONTRIBUTORY NEGLIGENCE.

Contributory negligence is a bar to the right of recovery.

JOHN BRANNON and W. MOLLOHAN for plaintiff in error, cited 36 Neb. 642; 39 W. Va. 366; 59 Ala. 245; 31 N. J. 293; 54 Am. & Eng. R. R. Cases 157; Patterson R. Accidents, § 284; 44 Am. & Eng. R. R. Cases, 610; 54 Am. & Eng. R. R. Cases, 328; 2 Am. St. Rep. 193.

W. B. MCGARY for defendant in error, cited Wood Mas. & S. §§ 327, 329, 438; Bailey's Master's Liability for Injuries to Servants, 1-7, 149, 457; Patterson on R. R. Accidents, §§ 284, 285, 308, 309, 315; 27 W. Va. 146; 100 U. S. 213; 81 Va. 71; 83 Va. 519; 24 W. Va. 37, 52, 54; 32 Mich. 510; 11 W. Va. 14, 16, 30; 17 W. Va. 214-15; 25 W. Va. 570; 17 W. Va. 190; 16 W. Va. 307; 31 W. Va. 142, 143; 35 W. Va. 390; 28 W. Va. 610-618; 37 W. Va. 502; 36 W. Va. 397; 38 W. Va. 206;

40	583
43	112

40	583
51	528

40	583
162	564

40	583
165	553

15 S. W. Rep. 970; 106 U. S. 700; 21 Am. St. Rep. 107; 49 N. W. Rep. 655; 14 Am. & Eng. Enc. Law, 831, 871; Beach Contributory Neg. § 54.

HOLT, PRESIDENT:

William Robinson, plaintiff's intestate, was a locomotive engineer on defendant's railroad, running from Weston south to Braxton C. H., and had been for three years next preceding the lamentable accident which caused his death, on the 10th day of December, 1892. On that day he started to run engine No. 1 and twelve empty freight cars from Weston to Sutton. At the Bendale sixteen degree curve, one and one-half miles from the starting point, while running at the forbidden rate of speed of about twenty miles an hour, the train and four cars left the track, killing the engineer Robinson, and crippling badly his fireman, William Byers.

There was evidence tending to show that on this curve, at or near where the train ran off on the outer side, the rail on that side was not higher than the inner rail.

There was a verdict for the plaintiff for four thousand dollars. A motion for a new trial was overruled, judgment rendered on the verdict, and from that judgment this writ of error was awarded.

It is the personal duty of the railroad company, no matter by whom it may be or is to be directly performed, to provide a reasonably proper and safe railroad track, machinery, and other suitable means and appliances, and maintain and keep them thus reasonably safe, and also reasonably fit and proper fellow servants. The servant takes upon himself the risks incident to the employment. A servant having knowledge of danger about him must use diligence and care in protecting himself from harm, and not willfully encounter dangers which are known to him. Neither can he recover if his injury was the direct result of his own disobedience of orders. In the case given, the mere fact of the accident creates no presumption of negligence on the part of the company. That must be done by affirmative testimony, and the burden of such proof is on the plaintiff; and, if it thereby

also is made to appear that the fault of the decedent contributed directly to the result, the right to recover does not arise; but otherwise the contributory fault and negligence of the plaintiff's intestate is matter of defense, and proof thereof must come from the defendant. Mere conjecture alone can not supply the place of the proof required. To believe on conjecture and to conjecture without evidence will not do. If there is no evidence in any fairly appreciable degree tending to prove defendant's negligence, then the court, on motion, should instruct the jury to find for the defendant; and the court must decide when the case calls for such instruction, for to that extent it is a question of law arising out of the testimony; but if in the opinion of the court the evidence tends in a fairly appreciable degree, not by a mere scintilla, to prove negligence on the part of the defendant, then the question should be submitted to the jury. If the verdict be for the plaintiff, and it is without evidence in the above sense, on some essential point, or it manifestly appears that there is a clear and decided preponderance of evidence against the finding of the jury, then the verdict should be set aside, and a new trial awarded; for, under our present statute, all the evidence must be considered.

The contention of the plaintiff is that the verdict is justified because it was made to appear that the railroad company failed to provide the decedent with a reasonably safe and proper engine, or a reasonably safe and proper track, at the Bendale curve. The defendant contends that plaintiff fails to make out his case on either ground, or to show by evidence, in any fairly appreciable degree of convincing effect, that defendant was negligent in any respect, and to put the cause of the accident or how it occurred on any ground higher than mere conjecture; and that conceding this to be the proven cause, then it appears by the uncontradicted testimony of his fellow servants who were on the train, that he ran it on this sharp curve, which he well knew, at a speed of twenty miles an hour, whereas he was warned of the character of the curve, and expressly told by those whose duty it was to command, to be careful and not run it (the Bendale curve) at a higher speed than about eight miles an hour.

1. Was the engine a reasonably safe and proper one? The machinist in the shop who brought out engine No. 1 for the trip, and inspected it and carefully examined it at the time and for the occasion, says it was in good condition. So also, the pony truck under the engine which leads it. The lead wheels of the engine were new and unworn, not having seen more than two months' service, at the longest, and presumably had not lost their flare. He appears to be a capable man of experience in such matters. Another engineer, who knew No. 1 well, saw it that day. Says No. 1 was the best of three engines at that point, and had nothing wrong with it. In fact, just after the accident it seems to have been in working order, except a flange of a wheel was partly broken off by what appeared to be a fresh, bright break. To this nothing in contradiction is shown, except that No. 1 was an old engine, which at some former time had been in a wreck, whereby the pilot had been broken off; but it had undergone many repairs and substitution of parts, and was at the time in question a good engine, in good running order, "and if properly managed, could have handled the train of empties safely," using the language of one of the brakemen on the train at the time of the accident.

2. Was the accident caused by an unsafe track at Bendale curve? It is a sixteen degree curve; that is, one with a radius of three hundred and fifty eight feet. Is such a curve, on such a road, at an exceptionally sharp degree, negligence *per se*? We are not so informed by any testimony in the cause; and it is not matter of general knowledge, especially when the company, as in this case, puts its finger on the very place, telling the engineer: "Run slow here; do not exceed the rate of eight miles." So the rules of the company prescribed. The decedent was an engineer on the road of two or three years' standing, and knew the curve well, and it was his duty to use diligence and care to protect himself from harm.

But it is said the outer rail is not five inches higher than the inner one, as it should be, and this, in so sharp a curve, caused the accident. On this point plaintiff introduced the testimony of a civil engineer of some railroad experience

during several years, who had occasion to pass along close to the curve once or twice a week for some six weeks, who noticed the track during the week preceding the accident. He says that the rail on the outside of the track was too low; that he noticed a place where the wheels were climbing and cutting off the fish-bar bolts; that these bolts had the appearance of having been partially cut off by the flanges of the engine, and had been taken out and replaced two or three times; that the outer rail he supposed to be five inches too low, and he considered it to be in such condition that an accident was liable to occur at any time, from the fact that the outside rail was too low, and he made that remark to another witness, who was passing the place with him some two or three weeks before the accident. But this is met on the other side by the testimony of Rebrook, the supervisor of the road, who had been engaged in laying and repairing track on that road and the Baltimore & Ohio for seventeen years. Had worked as a section hand, section boss, and on up to the position he now held as supervisor of the road from Weston to Sutton, and to Camden-on-Gauley, the southern terminus. Had laid the track in question. Had that day, not more than two hours ahead of this train, examined the track on the Bendale curve, and found it then all right, in good repair, and safe condition, and was on the road six hundred yards south of the place of the accident when it occurred. "The track was then in fairly good condition. I examined it. That was a part of my duties." In comparing the testimony of these two witnesses on this point, Mr. Gibson does not locate the low place in the outer rail as the place where the engine left the track, but as some point on this curve, and it was two or three days before the accident. Rebrook says the outer rail was given an elevation of five inches at that place. Has been kept up to just about that ever since, and to see that that was done was a particular part of his business, and on the day of the accident, at the place of derailment, it had about that elevation. He says: "On that day the track was perfectly safe to run at any rate of speed that the curve would admit of. Of course, it was a sharp curve, and you could not make any great rate of speed over it."

Here the question occurs, what was the safe and proper rate of speed? Rebrook says that he requested Mr. Lane, the assistant superintendent to notify all trainmen to run there at a rate not to exceed six miles an hour. He did not himself mention any particular speed to Engineer Robinson. He simply told him to be careful. He cautioned Robinson twice in regard to running around this Bendale curve, and several others. "I told him it was a very sharp curve, and a dangerous place, and he ought to be very careful in running around it." Robinson had run engines on this road as engineer during a period of two or three years. He was a good engineer, but was inclined to run too fast, as all who knew him and speak on the subject testify. But what were the direct proximate causes or cause, is a matter of inference or matter of conjecture. A. W. Marsh, a brakeman who was on the train at the time, says: "We were running over the maximum speed when we went off. It would have run without steam, being down grade, just before the curve was reached; but he used steam on the down grade, and was running anyhow between eighteen and twenty miles an hour when she jumped the track." J. P. Fox was the conductor on the train. He says that up to a point within four hundred or five hundred or six hundred feet of the place of the accident, he was making ten or twelve miles an hour. When he started down grade, he seemed to be still pulling the throttle open more, and gathered more speed as he went down the grade. "As near as I can judge, he was running twenty miles an hour when the engine jumped the track." William Byers, the fireman, who was badly hurt in the accident, says that at the time the speed was about fifteen miles an hour. Rebrook was within five hundred or six hundred yards of the train, and in sight until it turned into the curve where the accident happened, and could tell that the train was running down grade with steam on. That he was not running at this forbidden and dangerous rate of speed at the time there is nothing in this record that proves or tends to prove, but, on the contrary, the inferences tend to confirm these uncontradicted witnesses. An elevation of the outer rail of one and one-fourth inches, not observable by one measuring

with his eye, might have been enough for a speed of ten miles an hour, and just as safe, perhaps, at that speed, as an elevation of four and one-fourth inches, would have been at a speed of twenty miles an hour. There can be no escape, as it appears to me, from the conclusion, under this evidence, that if the lowness of the outer rail was one of the causes, the fast speed, in violation of explicit orders, at least contributed directly to bringing about the accident, and that would be a bar to the right of recovery. The experts who went upon the ground at once for the purpose of examining and remedying the condition of affairs, and ascertaining the cause of the accident, gave their testimony.

The assistant superintendent, a man of eighteen years experience in such matters, was on the ground as soon as he could get there; about the first one from Weston on the ground. He says: "I examined everything connected with it, so as to form an opinion as to the cause of the accident. The broken parts of the wheels were some ten or twelve feet from where the wheels left the track, so that the flanges seemed to have broken after the wheels were off the rails. There were no flaws in the wheels. The engine was all right. She had gone through a severe test. Had run nearly one hundred yards against the rocks. My theory was that the train had left the track on account of something being on it, or that the engineer had been running at a very rapid rate of speed, and the momentum caused the train to run too fast. It was regarded as being a severe curve and on that account we prescribed extra rules on slow running there, and considered it necessary that a train should run slowly there, not only on account of the curve, but also on account of the county road. Engineers were cautioned to run very slowly, and the instruction at one time was not to exceed eight miles per hour round that curve." After putting all the facts together as best he could upon the ground, he gives the above as his probable inference, founded on evidence too defective to enable him to give us anything beyond his conjecture as to the probable cause or causes of the accident; and the case seems to be left by the evidence in that condition. There is certainly nothing to

fix upon the defendant any liability for the accident; for if the lowness of the outer rail was a cause, the rapid and forbidden rate of speed of the engineer contributed to bring it about. No reasonable theory of the evidence will support the verdict.

Therefore, if we can not say that a sixteen degree curve is negligence *per se*, we must say that this verdict, tried by this record, is either wholly without evidence on the essential point of negligence, or that the fast running against orders contributed to the result; and if it is our place to see that even-handed justice be meted out as near as may be, according to the very truth of the matter before us, a new trial must be granted; and it is so ordered.

CHARLESTON.

ROLLINS v. NATIONAL CASKET Co. *et al.*

Submitted January 31, 1895—Decided April 13, 1895.

BILL IN CHANCERY.

Where a bill in chancery presents no substantial grounds for equitable interference, it is properly dismissed, as no errors committed by the court can be considered prejudicial to the plaintiff.

J. B. MENAGER for appellant.

H. R. HOWARD and L. C. SOMERVILLE for appellees, cited High Inj. §§ 114, 126, 130, 138, 1613; 83 Ind. 303; 6 Mont. 203; 17 W. Va. 474; 11 Gratt. 522; 2 Bart. L. Prac. 1072, note 1; Sto. Eq. Pl. §§ 75, 231, 236, 356, 369, 520; Calvert on Parties 77; Dan'l Ch. Pl. & Pr. 295, 299, 1,544, 1,676; Mit. Pl. 186, 57 s. p., note 2; Bart. Ch. Pr. 466; Code, c. 127, s. 2; 1 H. & M. 7; 11 W. Va. 694; 6 W. Va. 107, 108; 29 W. Va. 795; 12 W. Va. 668; 29 W. Va. 817.

DENT, JUDGE:

On the 19th day of September, 1893, the Circuit Court of Mason county entered an order dissolving an injunction

theretofore granted, and dismissing the bill in chancery filed by W. A. Rollins against the National Casket Company and others, from which order plaintiff appeals, and assigns the following errors, to wit:

"First. The court erred in rendering a final decree in the case, after the death of Jerry O'Connor had been suggested on the record, without reviving in the name of the personal representative of said decedent.

"Second. The court erred in entering a decree dissolving the injunction and dismissing the bill on the answer of E. J. Tippet, who, as appears from her own answer, was not a member of the firm of O'Connor & Tippet, and hence could know nothing of the matters involved in this suit; and, as no other defendants answered the bill, the same was taken for confessed as to the real and true defendants.

"Third. The court erred in overruling the objections to the answer of E. J. Tippet.

"Fourth. The court erred in overruling the plaintiff's motion for a continuance.

"Fifth. The court erred in not sustaining the plaintiff's exceptions to the reading of defendant's depositions taken during the sitting of the court.

"Sixth. The court erred in not perpetuating plaintiff's injunction, as none of the real parties in interest answered the bill, the answer of E. J. Tippet showing of itself that she was no such party in interest as to be able to deny the allegations of plaintiff's bill; and, if she were, her denial is too general to put the plaintiff on proof of his bill, as such general denial was excepted to."

The facts are as follows: E. Beller purchased a bill of goods of a firm known as O'Connor & Tippet, consisting of household and kitchen furniture, for the price of which he executed a note to said firm, calling for the sum of one hundred and fifty dollars, and a deed of trust on the furniture to George W. Tippet, trustee, to secure the payment of the note. That to prevent a sale of this property, already advertised, under said deed of trust, the said Beller executed a note negotiable and payable at the Merchants' Bank of West Virginia, at Point Pleasant, for the sum of one hun-

dred and twenty six dollars, being the balance due on the first note aforesaid, and the plaintiff, by endorsement thereon, transferred the same to O'Connor & Tippet to be used as collateral security for the first note. O'Connor & Tippet transferred the one hundred and twenty six dollar note to the National Casket Company. After it became due, it was presented, and protested for non-payment.

The bill alleges as grounds of equitable interference that the National Casket Company, being about to enter suit against the plaintiff and said Beller on said note, said company and the firm of O'Connor & Tippet agreed that if plaintiff would waive service of summons and suffer judgment to be taken on said note, they would turn over and deliver to him the one hundred and fifty dollar note, and the benefits of the trust deed; that by reason of such agreement plaintiff suffered judgment to be taken for one hundred and twenty eight dollars and nineteen cents principal, interest and protest, and two dollars and sixty cents costs; that after said judgment was taken, said parties refused to comply with their agreement, and deliver up said note, and permitted the property included in the trust deed to be sold, lost, and wasted—all which he alleges was done to deceive and defraud him; and therefore he prays that said judgment may be set aside, and held for naught, and that the defendants may be perpetually enjoined from collecting the same.

The first question that presents itself is whether the bill presents any true grounds for equitable interference as against the judgment and the defendants O'Connor & Tippet or the National Casket Company. If it does not, then the errors committed, if any, are not prejudicial to the plaintiff, and he has suffered no injury thereby.

The refusal to deliver the note in compliance with the contract furnishes no good reason for setting aside or enjoining the judgment, as equity always considers that done which ought to be done, and that the note, by the agreement to transfer, became the property of the plaintiff, and that the defendants had it simply as trustees for his benefit.

As to the property, there is no pretense that the plaintiff ever directed the trustee to sell or take possession thereof,

or that the defendants in any manner prevented or hindered him from doing so. If the note was his, as he claims, it became his duty to take possession of and sell the property; and the mere fact that the defendants O'Connor & Tippet and the National Casket Company remained quiet about the matter without request on his part gives him no grounds of equity against them on the judgment.

The bill does not charge that they were guilty of overt acts of unjustifiable interference, but that they permitted the property to be sold, lost, and wasted. So did the plaintiff; at least he does not pretend that he made any effort to prevent it. If the note had been the property of the National Casket Company, and they had refused to enforce the trust as a security for it, but had granted time to the principal debtor, with permission to dispose of the trust property without the consent of the plaintiff, then, by reason of his being merely a surety, he would have been released from the payment of the debt. But, so far as the case shows, the National Casket Company was an innocent holder for value of the negotiable note on which the judgment was taken, and had nothing to do in any way with the loss of the trust property.

Hence the plaintiff's clamor is wholly without foundation, and the decree of the Circuit Court is affirmed.

CHARLESTON.

STATE v. ZEIGLER.

Submitted January 31, 1895—Decided April 13, 1895.

1. HOMICIDE—SELF-DEFENSE—MANSLAUGHTER.

If an assault is made upon a man with an attempt to commit a felony upon him, he may resist so far as it is necessary to resist the assailant, even if he must take the assailant's life. But this has a limitation. If he can resist the assault and free himself without taking life, and kills the assailant without necessity, he is not excusable. If mere heat of blood impels him to take life in such case, he is guilty of manslaughter.

40	593
41	233
44	573
45	900
40	593
148	120
40	593
49	425
40	593
51	464
52	367
40	593
59	184
40	593
61	240
40	593
62	574
63	187
40	593
66	

2. HOMICIDE—SELF-DEFENSE—JUSTIFIABLE HOMICIDE.

To reduce homicide in self-defense to excusable homicide, it must be shown that the slayer was closely pressed by the other party, and retreated as far as he conveniently or safely could, in good faith, with the honest intent to avoid the violence of the assault.

3. HOMICIDE—SELF-DEFENSE—APPARENT DANGER.

Where one without fault himself, is attacked by another, in such a manner or under such circumstances as to furnish reasonable grounds for apprehending a design to take away his life or to do him some great bodily harm, and there is reasonable ground for believing the danger imminent that such design will be accomplished, and the person assaulted has reasonable ground to believe, and does believe such danger is imminent, he may act upon such appearances, and, without retreating, kill his assailant, if he has reasonable grounds to believe, and does believe that such killing is necessary in order to avoid the apparent danger; and the killing under such circumstances is excusable, although it may afterwards turn out that the appearances were false, and that there was in fact neither design to do him some serious injury, nor danger that it would be done. But of all this the jury must judge from all the evidence and circumstances of the case.

4. INSTRUCTIONS—EVIDENCE—JURY—IRRELEVANT INSTRUCTIONS.

It is error in a court, in a case of felony, to give to the jury instructions which are not relevant to the evidence, and which may mislead the jury to the prejudice of the defendant.

5. EVIDENCE—CONFLICT OF EVIDENCE—JURY.

If there be, in the opinion of the jury, a substantial conflict in the evidence or circumstances, as to whether the killing was done in self-defense, and the circumstances or other evidence preponderate in favor of self-defense, or if it was equally balanced as to the killing being done in self-defense, the jury ought not to convict either of murder or manslaughter.

6. EVIDENCE—INSUFFICIENT EVIDENCE—VERDICT—NEW TRIAL.

Where a court which tries a cause certifies all the evidence adduced on the trial, and from the evidence so certified it clearly appears that it was wholly insufficient to sustain the verdict, this Court will set aside the verdict, and, in a proper case, award a new trial.

D. B. LUCAS for plaintiff in error, cited 34 W. Va. 117; 17 S. E. Rep. 240; 20 S. W. Rep. 561; 17 S. E. Rep. 108; 8 W. Va. 766; 20 W. Va. 679; 37 W. Va. 813; 3 Greenl. Ev. § 5. note d; 117 N. Y. 71; 123 N. Y. 553; 121 Pa. St. 165; 128 Pa. St. 500; 1 Gray 61; 97 U. S. 237; 1 Bish. Crim. Pro. 1048.

ATTORNEY-GENERAL RILEY for the state, cited 33 W. Va. 370; 8 W. Va. 741; 20 W. Va. 680; *Id.* 764; 22 W. Va. 801; 5 W. Va. 510; 1 Greenl. Ev. (11th Ed.) § 449.

FOREST W. BROWN for the state, cited 36 W. Va. 691, 701; 20 W. Va. 680, 681, 679, 713, 764; 37 W. Va. 812, 820, 821; 32 W. Va. 177; 33 W. Va. 72, 417, 418; 1 Greenl. (14th Ed.) §§ 51, 445, 449; 1 Bish. Crim. Law (14th Ed.) § 849; 2 *Id.* §§ 184, 707; 25 Gratt. 887.

ENGLISH, JUDGE:

At the April term of the Circuit Court of Morgan county, in the year 1894, the grand jury of said county found an indictment against Rudolph Zeigler; charging that on the 13th day of February, 1894, in said county of Morgan, he feloniously, willfully, maliciously, deliberately and unlawfully did slay, kill, and murder one John Sautters, against the peace and dignity of the state.

The plea of not guilty was interposed, issue joined thereon, and the case was submitted to a jury on the 1st day of May, 1894, which resulted, on the 9th day of the same month, in a verdict of not guilty of murder as charged in the indictment, but guilty of voluntary manslaughter. A motion was made in arrest of judgment, and for a new trial, which motions, having been argued, were overruled by the court, and the prisoner excepted. Judgment was rendered upon the verdict, and the prisoner was sentenced to confinement in the penitentiary for the period of two years, and the prisoner obtained this writ of error.

Self-defense was relied on by the prisoner, and it appears from bill of exceptions No. 8 that after the evidence was concluded, and before the argument commenced, the prisoner, by his counsel, prayed the court to give the jury the following instructions: Instruction No. 1 for defendant: "The court instructs the jury that if from the evidence, the jury be of opinion that there is a substantial conflict of the evidence or circumstances as to whether the killing was done in self-defense, and the circumstances or other evidence preponderate in favor of self-defense, or if it was equally balanced as to the killing being done in self-defense, the jury

can not convict the prisoner either of murder or manslaughter." Instruction No. 2: "The court instructs the jury that the owner of property, in the possession of the same, has the right to use as much force as is necessary to prevent a forcible trespass; and if they find that the defendant was standing upon his own ground, and that in attempting to force a passage over the same, if they so find, the deceased was violating the law, and was a trespasser, with the intent and with the means to commit a felony, if necessary to accomplish the end intended, then the defendant, as owner of the property, if they so find, might repel force by force, to the extent of killing the aggressor, and such killing would be self-defense." Instruction No. 3: "The court instructs the jury that a party who is assailed by his adversary with a deadly weapon is not compelled to retreat, but may slay his adversary, if the assault be so fierce as not to allow the party assailed to retreat without manifest danger to his life, or enormous bodily injury. In such case, if there be no other way of saving his own life, he may, in self-defense, kill his assailant." Instruction No. 4: "The court instructs the jury that if when the deceased fired the fatal shot he was not the aggressor, but was assailed, and such demonstrations of force, with a deadly weapon and otherwise, made against him as to lead a reasonable man to suppose he was in danger of death or great bodily harm, and under such reasonable apprehension he killed the deceased, who was assailing him, if they so find, then the killing was justifiable, in self-defense."

These instructions were objected to by the state, and the court declined to give them, and the prisoner excepted; and the court, on its own motion, gave the jury, in lieu of said instructions, the following: Instruction No. 1: "The court instructs the jury that when one, without fault himself, is attacked by another in such a manner or in such circumstances as to furnish reasonable grounds for apprehending a design to take away his life or to do him some great bodily harm, and there are reasonable grounds for believing the danger imminent, that such design will be accomplished, and the person assaulted has reasonable grounds to believe and

does believe that such danger is imminent, he may act upon such appearance, and without retreating, kill his assailant, if he has reasonable grounds to believe, and does believe, that such killing is necessary in order to avoid the apparent danger; and the killing under such circumstances is excusable, although it may afterwards turn out that the appearances were false, and there was in fact neither design to do him serious injury, nor danger that it would be done. But of this the jury must judge, from all the evidence and circumstances in the case."

No. 2: "And the court further instructs the jury that as to the imminency of the danger which threatened the prisoner, Rudolph Zeigler, and the necessity of his killing John Sautters, in the first instance, the prisoner is the judge, but he acts at his peril, as the jury must pass upon his action in the premises, viewing said actions from the prisoner's standpoint at the time of the killing, and if the jury believe, from the facts and circumstances of the case, that the prisoner had reasonable grounds to believe, and did believe the danger imminent, and that the killing was necessary to preserve his own life, or to protect him from great bodily harm, he is excusable for using a deadly weapon in defense, otherwise he is not." No. 3: "The court instructs the jury that, on a trial for murder where a deadly weapon is used, if the prisoner relies on self-defense, the burden of proof is on the prisoner, and he must excuse himself by a preponderance of the evidence." No. 4: "The court instructs the jury that the defendant is, by law, presumed to be innocent, and it is the duty of the state to prove him guilty, as charged in the indictment, beyond all reasonable doubt; and if the state fails to prove every material allegation in the indictment, then the jury must find him not guilty."

The court also, at the instance of the state, gave the jury the following instructions, which were excepted to by the prisoner. The exceptions were overruled by the court: Instruction No. 1: "The court instructs the jury that under an indictment for murder the jury may find the prisoner guilty of murder in the first degree, or guilty of murder in the second

degree, or guilty of voluntary manslaughter, or guilty of involuntary manslaughter, or not guilty." Instruction No. 2: "The court instructs the jury that where a homicide is proven, the presumption is that it is murder in the second degree. If the state would elevate it to murder in the first degree, she must establish the characteristics of that crime; and, if the prisoner would reduce it to manslaughter, the burden of proof rests upon him to establish the same by preponderance of evidence." Instruction No. 3: "The court instructs the jury that if they believe from the evidence that John Sautters came to his death by a pistol-shot wound inflicted by Rudolph Zeigler, and at the time he was so killed the said John Sautters was in the exercise of a right that belonged to him, of passing along a private right-of-way, and that Rudolph Zeigler at said time was wrongfully preventing his passage along said right-of-way, and in so doing, willfully and maliciously, deliberately and premeditatedly, inflicted the wound by which said Sautters came to his death, then he is guilty of murder in the first degree." Instruction No. 4: "The court instructs the jury that where there is a quarrel between two persons, and both are in fault, and as a result of such quarrel a combat takes place, and death ensues, in order to reduce the offense from the degree of murder two things must appear from the evidence and circumstances of the case: (1) That before the mortal wound was given the prisoner declined further combat, and retreated as far as he could with safety; and (2) that he necessarily killed the deceased in order to save his own life, or to protect himself from great bodily harm." Instruction No. 5: Same as last one. Instruction No. 6: "The court instructs the jury that a man shall be taken to intend that which he does, or which is the immediate or necessary consequence of his act; and if the jury believe from the evidence in the case that Rudolph Zeigler, the prisoner, with a deadly weapon in his (prisoner's) possession, without any, or upon very slight provocation, gave to the deceased, John Sautters, a mortal wound, then said Zeigler is *prima facie* guilty of willful, deliberate, and premeditated killing, and *this* throws upon the prisoner the necessity of proving exten-

uating circumstances, and that unless the prisoner has proved such extenuating circumstances, or such circumstances arise out of the case made by the state, the jury must find the prisoner guilty of murder in the first degree."

The prisoner moved the court to set aside the verdict of the jury, which motion was overruled by the court, and the evidence was certified in a bill of exceptions.

The first error assigned and relied upon by the prisoner is as follows: "(1) It was error not to arrest the judgment, and grant him a new trial. The evidence clearly established that the petitioner acted strictly in self-defense, and the homicide was therefore excusable. There was but one witness for the state whose testimony made out a case of murder or manslaughter, and that was Christian Baurle. Upon the contrary, three other witnesses who were present—the prisoner, his son William, and his wife, Louisa Zeigler—all contradicted Baurle, and their testimony tends to exhibit a case of self-defense, and to show that Baurle and the deceased, Sautters, were the aggressors; that Baurle assaulted Zeigler first, and Sautters followed it up by snapping his musket at him, and then clubbing the gun and striking him with the butt end a severe blow, leaving a scar still plainly visible. His evidence is confirmed by Dr. Green, who dressed and probed the petitioner's wound and proves that it was inflicted by some blunt instrument. The state introduced a witness (the wife of the deceased) who proved that she distinctly saw something raised up in the air like the butt of a gun. It is plain therefore, that the jury found against the weight of evidence and this verdict should have been set aside, and a new trial granted."

This assignment of error calls for an investigation of the feeling existing between the prisoner and the deceased, and the immediate circumstances surrounding the parties, at the precise moment when the fatal shot was fired. Trouble existed between the deceased and the prisoner in regard to a road which the prisoner claimed was a private road, and which deceased claimed was a public road. In pursuance of his claim, prisoner had obtained an injunction restraining the use of said road as a public road. On the

day the shooting occurred, the deceased was evidently apprehensive of something which might not only require a witness, but also the use of a gun. He told Baurle he was going to the store, but it must be regarded as an unusual occurrence to carry a musket when merely going to the store. The testimony shows that said Baurle and Sautters had been on the prisoner's premises on the 15th of July previous, with two other men, all armed with guns, and cut down the bars which Zeigler (the prisoner) had constructed across this road. Sautters called on his friend and neighbor, Baurle, who claimed this road as an outlet from his farm, to accompany him as a witness; saying that prisoner stopped him before, and he would like to have some one go along with him. When deceased, carrying his gun, arrived at prisoner's premises, he found him engaged in hauling out manure. Prisoner and his son came out of his barnyard, and prisoner told deceased he had an injunction on that road, and that they should not travel it any more. Baurle says he told him "All right," but heard Sautters say, "It is our road, and we are going to travel it." That Zeigler came up pretty close to him. He stood still. Zeigler stood right in front of him, two or three feet away. Witness told him, "Better stop that;" he did not want to see any bloodshed on this place. That Zeigler struck him first, about his body, with his fist. That he struck back; struck Zeigler on his head; gave him the mark he got on his head. Sautters was four or five steps away. Zeigler's son came up, and took hold of witness, and shoved him back on a bank at the side of the road. When witness raised up and turned around, Zeigler shot him in the arm. Witness then turned and ran. Saw Sautters as he passed. He had his gun on his arm. Was doing nothing. It was an old army gun. This only lasted from five to eight seconds. Witness was running away, and did not see the parties when the fatal shot was fired. Saw Zeigler point pistol towards Sautters. Saw no blood on Zeigler's face after he struck him. This is in substance, the testimony of Baurle, who went with Sautters for the purpose of being a witness.

William Zeigler, who was present, says, as he came out of

the barnyard gate, Sautters came up with his gun pointed at his father. That Baurle had both hands in his pockets, but, as Sautters came up, he out with his left hand, and motioned in front of his father, and said, "Hold on, John, we don't shed cold blood," and his father, facing that way, said, "I neither,"—waving his hands outward, and had nothing in his hands. Sautters still advanced until he held his gun in one and one-half feet of his father. Baurle pulled his right hand out of his pocket, and struck witness' father, and witness came around behind Baurle, and pulled him away. Had no more than caught hold of Baurle than Sautters snapped gun-cap. That he got Baurle away from his father after the cap snapped. Sautters raised his gun up reversed; caught hold of barrel of gun, and struck prisoner over the head with it, and had gun raised to bring it down a second time before prisoner shot. That Baurle got away from witness, and ran into his father, and wheeled him around, and prisoner shot at Baurle, who ran. Sautters stood a little while after he received the first shot, and was fixing at his gun as though putting another cap on. He then looked towards his house, and saw Baurle running, and started and ran also, until he fell.

The prisoner also gave substantially the same statement as to the manner in which the killing was done; stating that he did not shoot Sautters until he had struck him once with the gun over the head, and was preparing to strike him a second time.

According to Baurle's testimony the prisoner was pointing his pistol at Sautters without his offering to strike with the gun, and he states that the wound in prisoner's head was caused by his fist; but Dr. Green states that he found prisoner suffering with wound on left side of head, and also one about the ear or temple; thinks it was inflicted by coming in contact with some blunt instrument; wound could have been inflicted by gun, or instrument of that kind. And Mrs. Sautters, the wife of the deceased, who says she went down to the end of the garden and had a good view, and was near enough to hear what Zeigler said to Baurle about the injunction, when asked on cross-examination, "Did you not say, in

substance, 'In the melee, I distinctly saw a gun in the hands of some one, with butt or breech in the air, overhead of parties?'" answered: "I did say that. I looked since, and saw a locust post that looked just like that."

The witness Baurle further testifies that when he ran, he saw Zeigler point his pistol towards Sautters, and heard pistol cracks coming closer and closer to him; seeking to create the impression that Sautters was retreating and the prisoner pursuing him, at the time he was wounded. But that theory is at once refuted by the fact that the evidence shows that Sautters was shot in the breast. It is then apparent and manifest that this witness, Baurle, was retreating at full speed at the time the fatal shot was fired. He was not in a position to say whether Sautters clubbed his gun and struck the prisoner over the head with it, or not. The prisoner and his son concur in stating that Sautters had struck prisoner over the head with his gun, and was preparing for the second stroke when he received the fatal shot; and it is evident there would have been no necessity for clubbing the gun, had he fired when the cap bursted. Baurle does not mention the stroke inflicted upon the prisoner with the butt of the gun, but states that the wound in Zeigler's head was caused by his fist; and, to place the most charitable construction upon this testimony of his, we must say that Baurle did not see or know what transpired after he received his wound and hastily left the battle ground. The fact that the gun was clubbed and used at some time during the combat does not rest alone upon the testimony of the prisoner and his son, but the wife of the deceased states that she saw the gun brandished above the heads of the combatants; and, unless it was done after Baurle retreated, it is clear that he suppressed a very material and important fact, in delivering his testimony. That the butt of the gun was used upon the head of the prisoner appears from the fact that the prisoner had a contusion on his forehead near his eye, and congestion of the eye, which was evidently the result of the blow received from the fist of Baurle, while Dr. Green, who examined the prisoner's wounds, says he had one wound on the left side of the head, and also one about the ear or temple,

and that the wound was inflicted by some blunt instrument, and could have been inflicted by a gun, or instrument of that kind. Again, Sautters had not been shot when Baurle passed him, running away. Two things then must have transpired in a brief space of time after Baurle passed: The gun was brandished, and Zeigler received the blow, and the fatal shot was fired while Sautters was facing the prisoner, because he received the wound in front, as shown by the testimony of Dr. Ross. Zeigler received the blow from the gun on the left side of his head, as it would naturally be dealt by a right-handed man, facing his adversary. Sautters received the fatal shot immediately after Baurle passed him, for the evidence shows that he followed Baurle, and fell on the road only thirty yards behind him.

This was the case presented to the jury by those who were present, and had an opportunity of seeing what transpired. In addition to this, Mrs. Sautters, the wife of deceased, states that she heard the prisoner tell Baurle "they shouldn't travel that road, and said something about injunction." She also states that prisoner, after firing first shot, fired two more shots at Baurle as he ran.

Now, there can be no question from the testimony that had feeling existed between the prisoner and the deceased. It appears from the testimony of Isaac Holton: That he was invited to go to Zeigler's, and was told that Baurle and Sautters were going to open this road. It was then obstructed by bars. That he went, and Sautters and Baurle had guns. Zeigler was engaged in hauling hay. That Charles Butte cut the bars down, and he and Zeigler came together in fighting attitude, and Charles Butte pushed or knocked him down. That Zeigler picked up two rocks, and witness told him not to do that—he might get hurt, or hurt somebody—and he threw the stones down and went into his barnyard. Subsequent to that time, the record discloses that repeated threats were made by Zeigler and Sautters on account of the feeling existing in regard to this road. Zeigler appealed to the law for protection, and obtained the injunction, of which he gave Sautters notice at the time he approached, on the day the shooting occurred.

The testimony in the case discloses the deadly hostility entertained by the deceased, Sautters, towards Zeigler. He told Simon Barsore that Zeigler stopped him in the road one time, and "if he'd stop him again he would kill him." Emma Young heard him say he was going to load his gun heavy with buckshot, and be ready for Zeigler. He said to W. H. Poole, "Let that ole booger stop me on that road, and right there is where he kills me, or I kill him." On the day of this fatal occurrence the deceased approached Zeigler (who was at his own home, engaged in his farming operations) carrying his loaded musket, ready cocked, and pointed directly at him. During the struggle between Baurle and the prisoner, deceased displayed his deadly intent by bursting the cap on his gun at him; and after the prisoner had received a heavy stroke from the fist of Baurle, it was followed by a crushing blow on the head from the breech of the gun, and the deceased was preparing to follow it up with another. And it occurs to me that if Zeigler wished anything left in the shape of self to defend, the time for action had arrived. It is true, he was carrying a revolver, and thinking the occasion had arrived when it might be used, he used it with deadly effect; and while it is also true that our statute prescribed a severe penalty for carrying a pistol, yet it expressly excepts from such penalty a person who carries such weapon about his dwelling house or premises. In Whart. Hom., under the head of "Excuse and Justification" (section 480, note 6), the definition of "justifiable homicide" is stated thus (quoted from the opinion of Chapman, C. J., in the case of *Com. v. Andrews*): "There is still another definition that needs to be given to you, namely, what constitutes justifiable homicide; for a question may arise here in regard to that subject. It rests upon the right of self-defense. The law regards it as a sacred right, and every man's heart justifies the principle. If an assault is made upon a man, with an attempt to commit a felony upon him, he may resist so far as it is necessary to resist the assailant, even if he must take the assailant's life. But this has a limitation. If he can resist the assault and free himself without taking life, and kills the assailant without necessity, he is not ex-

usable. If mere heat of blood impels him to take life, in such a case he is guilty of manslaughter." And in section 8 of the same work the author says: "*Se defendendo*, or in self-defense, which exists where one is suddenly assaulted, and in the defense of his person, where immediate and great bodily harm would be the apparent consequence of waiting for the assistance of the law, and there is no other probable means of escape, he kills the assailant. To reduce homicide in self-defense to this degree, it must be shown that the slayer was clearly pressed by the other party, and retreated as far as he conveniently or safely could, in good faith, with the honest intent to avoid the violence of the assault."

The law never intended, however, that in the circumstances of this case it was the duty of Rudolph Zeigler, the prisoner, to run away from his home, or hide himself, when the deceased (Sautters), accompanied by his friend and witness, came with their guns to force their way through this road. They were warned of the existence of the injunction by Zeigler; and, after the difficulty commenced between Zeigler and Baurle, it must be remembered that the entire combat only lasted, according to the testimony, from five to eight seconds. During that period Zeigler had received a heavy blow on the head from the fist of Baurle, which, according to Baurle's testimony, knocked Zeigler away from him, and turned him around. Baurle had been pulled away and thrown back by William Zeigler (the son) and had rushed again at Zeigler, and received the shot in the elbow, and started to run. Zeigler fired two shots in quick succession after Baurle; and Sautter's gun having failed to shoot, he clubbed his gun, and struck Zeigler over the head, and was raising it for a second stroke when Zeigler fired the fatal shot. Now, if we put ourselves in the place of Zeigler for the few seconds that this combat lasted, and consider that Baurle says "he don't know how hard he struck, and whether he struck once or twice; that he is a coward and if he strikes a man he strikes him good;" and that defendant while staggered and blinded by this blow on the eye and forehead, receives the crushing blow from the butt of the musket in the hands of Sautters—we may well infer that the fierce-

ness of the assault from these two men was such as to preclude all possibility of retreat with any degree of safety, even if sufficient strength remained after these paralyzing strokes.

In the case of *State v. Cain*, 20 W. Va. 680, this Court stated the law as follows: "Where one, without fault himself, is attacked by another in such manner or under such circumstances as to furnish reasonable grounds for apprehending a design to take away his life or to do him some great bodily harm, and there is reasonable ground for believing the danger imminent that such design will be accomplished, and the person assaulted has reasonable grounds to believe and does believe such danger is imminent, he may act upon such appearances, and, without retreating, kill his assailant, if he has reasonable grounds to believe that such killing is necessary in order to avoid the apparent danger; and the killing under such circumstances is excusable, although it may afterwards turn out that the appearances were false, and that there was in fact neither design to do him serious injury, nor danger that it would be done. But of all this the jury must judge from all the evidence and circumstances of the case." It is proper just here to call attention to the fact that the prisoner had actually made no demonstration of any kind whatever towards the deceased until after he snapped his gun at him, and after he received the blow on his head with the breech of the gun. Before that his entire attention appears to have been occupied with Baurle. Bishop, in his work on Criminal Law (volume 1, § 865) states the rule thus: "If one who is assaulted (we have seen that there must be an overt act rendering the danger imminent) being himself without fault in bringing on the difficulty, reasonably apprehends death or great bodily harm to himself unless he kills the assailant, the killing is justifiable." Now, that the deceased started from his home with his loaded gun, with the deliberate intention of carrying out his previous threats by killing the prisoner if he came out to him in that road, is manifest from his subsequent actions; by his snapping his gun at prisoner while engaged in combat with Baurle; by clubbing his

musket and attacking prisoner before he had recovered from the stunning blow received from Baurle. That Baurle knew what his intention was is shown by his language when Sautters first pointed his gun at the prisoner—"John, hold on, don't shed cold blood." Turning to the conduct of prisoner, we find that although the deceased, Sautters, came towards him in this threatening attitude, with his gun pointed, and hand about the lock, nothing in the entire testimony shows that the prisoner made any demonstration towards the deceased until after he received the blow from the musket. True, Baurle, who came there as a witness, says, as he ran he saw the prisoner point his pistol towards deceased; but that is met and refuted by the fact that Baurle was running towards, and passing by Sautters; was wounded and frightened himself; and the prisoner fired two shots after him after he commenced running. In this connection we may ask, what is the law, as settled in this state, where self-defense or other justification is set up? Haymond, P., in the case of *State v. Abbott*, 8 W. Va. 766, in delivering the opinion of the court, said: "If the circumstances and evidence tend to prove self-defense, or other legal justification, then, as to the question of whether the act was done in self-defense, or other legal justification, if, in the opinion of the jury, a substantial conflict of circumstances or other evidence exists, there should be such a preponderance of circumstances or other evidence against the self-defense, or other justification, as to reasonably satisfy the mind of the jury that the killing was not in self-defense, or justifiable, before they can convict. If there be, in the opinion of the jury, a substantial conflict of the evidence or circumstances as to whether the killing was done in self-defense, and the circumstances or other evidence preponderates in favor of self-defense, and, I should add, if it was equally balanced as to the killing being done in self-defense, the jury ought not to convict of either murder or manslaughter." This Court, however, in a later case (*State v. Jones*, 20 W. Va. 764) held that "upon a trial for shooting with intent to kill, the use of a deadly weapon being proved, and the prisoner relies upon self-defense to excuse him for the use of the weapon, the burden of

showing such excuse is on the prisoner; and, to avail him, he must prove such defense by a preponderance of evidence." It is true that the courts in this state and the old state have guarded with jealous care the province of the jury in criminal trials, and have declared more than once their aversion to interference with verdicts, and have announced that although they might have rendered a different verdict if they had been upon the jury, yet they ought not to interfere. Still we find, in the case of *Hill v. Commonwealth*, 2 Gratt. 595, it was held that "this court will only set aside a verdict because it is contrary to the evidence in a case where the jury have plainly decided against the evidence, or without evidence;" and in the case of *Grayson v. Commonwealth*, 6 Gratt. 712, the law was thus stated, "A new trial will be granted when the verdict is against law, or where it is contrary to the evidence, or where the verdict is without evidence;" and in *Foster's Case*, 21 W. Va. 767, it is held that "where the court which tried the cause certified all the facts proved on the trial, and from the facts so certified, it clearly appears that they were wholly insufficient to sustain the verdict, this court will set the verdict aside, and, in a proper case, award a new trial." The facts and circumstances developed by the testimony in this case are such as, in my opinion, made out a case of self-defense. The fierceness of the assault made upon the prisoner with the musket immediately after he had received the stunning blow from the fist of Baurle was such as to admit of no retreat with safety, and nothing was left him, to save his own life or prevent great bodily injury, but to use his weapon; and I think the jury should have so found, and the court, on motion, should have set this verdict aside.

The next assignment of error is as to the action of the court in excluding the testimony of Conrad Potter as to threats made by Baurle against the prisoner. These threats, whether communicated to the prisoner or not, were admissible to show the prejudice and state of mental feeling on the part of the witness towards the prisoner, and should

not have been excluded; and the same may be said in reference to the evidence offered in regard to the feeling of the witness Lutman, which was excluded by the court.

The fourth assignment of error is as to the exclusion of the testimony of John Johnson as to threats made by the deceased against the prisoner, that he would kill him if he came out to him on that road. It is true that the witness did not mention Zeigler's name in that conversation, but he was talking about this road, and it was well understood what he intended. This threat does not appear to have been communicated to Zeigler; but threats of Zeigler had been shown, and it should have been allowed to go to the jury, in connection with the subsequent acts of the deceased, to show that his going to Zeigler's with his loaded gun was in pursuance of a previously formed design.

The sixth assignment of error is as to the action of the court in excluding the testimony of George Shriver, who after testifying as to his being road surveyor, and about some conversation with prisoner as to whether the road in controversy was a public road, was asked on cross-examination, if the deceased cut down the bars of Zeigler on said road; and the court ruled that if the defense wished to ask any questions about other conversations, they would have to make him their witness. And, while I think the question would have been proper, if asked in chief, I think it was properly excluded on cross-examination.

The sixth and seventh assignments of error, I think, were well taken. The first relates to the contradiction of the witness W. E. Butts in a material matter, where the foundation had been properly laid; and the second rests upon the same ground.

The eighth assignment of error relates to the action of the court upon the instructions asked for—in refusing all of the instructions asked for by the prisoner, and giving all save one asked by the state. The first instruction asked for by the prisoner was properly rejected, as it fails to state the law as laid down in the case of *State v. Jones*, 20 W. Va. 764. The second instruction prayed by the defendant was properly refused, as I do not think it states the law correctly. Whart.

Hom. § 414, states the law upon that point thus: "A bare trespass against the property of another, not his dwelling house, is not sufficient provocation to warrant the owner in using a deadly weapon in its defense; and if he do, and with it kill the trespasser, it will be murder, and this though the killing were actually necessary to prevent the trespass."

The Circuit Court committed no error in rejecting instructions Nos. 3 and 4, prayed for by the prisoner, for the reason that they are not sufficiently qualified by stating, as was stated in *Cain's Case*, in the instruction given by the court upon this question, in instruction No. 1 for the defendant. "When one, without fault himself, is attacked," etc. Instructions 3 and 4 should have contained this qualification, and instructions Nos. 1 and 2, given for the defense by the court, not only contained this qualification, but embodied all that was asked for by the prisoner in said instructions Nos. 2 and 4. It is true, this Court held in *State v. Evans*, 33 W. Va. 418 (10 S. E. Rep. 792) that "a party has a right to have his instructions given in his own language, provided there are facts in evidence to support it; that it contains a correct statement of the law, and is not vague, irrelevant, obscure, ambiguous, or calculated to mislead." But, unless they state the law correctly, they should be rejected.

For the foregoing reasons the judgment complained of must be reversed, the verdict set aside, a new trial awarded, and the cause is remanded.

BRANNON, JUDGE:

I doubt whether under the rule of practice in this Court, we should express any opinion upon the evidence, as the case must be retried for other reasons than those arising under the motion for a new trial under the evidence.

CHARLESTON.

21 S.E. 746

WARD v. WARD'S HEIRS.

Submitted January 15, 1895—Decided April 13, 1895.

1. TENANCY IN COMMON—OCCUPATION BY A COPARCENER.

By common-law, one joint tenant, tenant in common, or parcener using the common land exclusively, but not ousting or excluding his co-owners, is not chargeable to them for use and occupation; but this rule has been changed by section 14, chapter 100, Code, as to joint tenants and tenants in common, but not as to parceners.

2. TENANCY IN COMMON—OCCUPATION BY COPARCENER.

A coparcener, merely from sole occupation of the premises, is not chargeable in favor of coparceners, unless he excludes them.

3. TENANCY IN COMMON—OCCUPATION BY CO-PARCENER—IMPROVEMENTS BY COPARCENER.

Where it is proper to allow a coparcener for improvements, a charge for use and occupation may be set off against the improvements.

4. TENANCY IN COMMON—IMPROVEMENTS BY COPARCENER.

Permanent improvements made by one coparcener, without request or agreement of others are not chargeable to the others personally or upon their shares in the land; but if made by their request or agreement, they are a debt upon them, and a lien on their shares in the land.

5. TENANCY IN COMMON—CONTRIBUTION BY COPARCENER—REPAIRS BY COPARCENERS.

One joint tenant, tenant in common, or coparcener can compel others to contribute to make necessary repairs to a mill or house, after request to assist and refusal. But this compulsion is as to future repairs, not those already made by one of the co-owners. This compulsion only applies to mills and houses, not to fences or other repairs to other properties.

6. TENANCY IN COMMON—IMPROVEMENTS BY COPARCENER—PARTITION.

In partition the part improved, if it can be done without injury to others, should be assigned to the improver; but when this can not be done, the cost of improvement can not be charged to him to whom it goes.

40	611
42	146
43	589
40	611
43	589
40	611
47	75
47	406
40	611
49	600
50	618
40	611
51	517
40	611
63	257

7. TENANCY IN COMMON—IMPROVEMENTS BY COPARCENER—PARTITION.

Where, however, the property is not susceptible of partition, and must be sold to divide the proceeds, the coparcener who made repairs and permanent improvements shall receive out of the proceeds that amount by which the property, at the date of sale, remains enhanced in value from the improvements, not their original cost.

8. CHANCERY PRACTICE—COMMISSIONER'S REPORT—EXCEPTIONS.

Where there is no exception to a commissioner's report, except as to error on its face, it is taken as admitted by the parties to be correct, both as to the principles and the evidence on which it rests, and the court will not look into it, but must act on it as so admitted, except as to infants and persons *non compos*. If excepted to not later than the first term after its return, or later by leave of court, the admission of its correctness ceases, and the court will examine it; but on the hearing of such exception, unless taken within ten days after completion of the report before the commissioner, no evidence before him can be used, unless he has made it a part of the report, or certified it, or the court requires him to certify such evidence by order, in which cases it may be used to sustain the exception; but depositions taken after the return of the report can not be used to overthrow the report. They can be used only to support a motion to recommit the report.

9. CHANCERY PRACTICE—COMMISSIONER'S REPORT—EXCEPTIONS.

Error on the face of a report may be taken advantage of in the lower or appellate court, with or without exceptions.

10. CHANCERY PRACTICE—COMMISSIONER'S REPORT—EXCEPTIONS.

Where exceptions is taken to a commissioner's report before the commissioner, within ten days after its completion, it is his duty to certify the exceptions and evidence before him relating to the exceptions, with such remarks as he may see proper to make, in order that the exceptions may be heard by the court upon such evidence. He should so certify the evidence as to show it to be the evidence sent up.

11. CHANCERY PRACTICE—COMMISSIONER'S REPORT—EXCEPTIONS.

Where such exception has been so taken within ten days, the party excepting, or the adverse party, may take further evidence before the return of the report, and upon it the commissioner may amend his report, or make an amended report, as may suit the case, and then return his report and amendment, if any, to the office of the court.

W. R. D. DENT for appellant, cited 21 W. Va. 262; 24 W. Va. 524; 27 W. Va. 220; 38 W. Va. 677; 21 N. J. Eq. 11; 50 Me. 253; 91 Pa. St. 438; 79 Ky. 148; 9 N. J. Eq. 566; 58 Miss. 241; 80 Ala. 395; 11 Am. & Eng. Enc. Law, 1104, 1107.

B. F. MARTIN and FRANK W. WOODS for appellees, cited 8 W. Va. 135; 70 Md. 42; 35 W. Va. 721; 27 W. Va. 639; 28 W. Va. 715; 24 W. Va. 525; 27 W. Va. 227; 19 W. Va. 459; 1 Hen. & Mun. 404; 78 Va. 720.

BRANNON, JUDGE:

Maria Ward died seised of a hotel property known as the "Ward House," in the town of Grafton, leaving a husband and six children. Her husband, George W. Ward occupied the property as tenant by the curtesy from February, 1878, when his wife died, until December, 1880, when he died. Four of his children lived in the hotel with him, the plaintiff, L. E. Ward, John B. Ward, Mrs. Broyles, and Archibald Ward. Before the father's death, and for eleven years afterwards, the plaintiff, L. E. Ward, occupied a stable on the property as a livery stable, and after his death Mrs. Broyles and husband occupied the hotel. Mrs. Broyles, by purchase from coparceners at different times after her father's death, became owner, including her own share, of five-sixths of the property.

L. E. Ward brought this suit in the Circuit Court of Taylor county, alleging that in 1879 he and several others of the parceners, seeing that the property was badly in need of repair, almost entirely rebuilt and greatly enlarged the hotel, at great expense, he furnishing a large amount of means, labor, and material, of the amount of one thousand five hundred and thirty eight dollars and twenty six cents, and that Archibald F. Ward and Lloyd M. Broyles, for his wife, furnished material and labor, for which amount expended by him he claimed compensation. He further alleged that for several years Broyles and his wife had the possession and use of the hotel property, except the stable, without payment of rent, but had paid taxes, and put some repairs on the property from time to time as needed, and that he, the plaintiff, had occupied the stable without payment of rent. He prayed that an account of the rent and improvements be taken; the amount due him and others be decreed; that the property be rented or sold to satisfy those charges, and also that the property, not being susceptible of partition, might be sold,

and the proceeds divided. The other parties resisted this demand of the plaintiff for improvements, saying that such improvements were made by their father while in possession as tenant by the curtesy, and any charge by the plaintiff was against him, not against his coparceners, as they never assented to such improvements, and neither they nor their property were liable therefor. The case was referred to a commissioner, and he reported a large sum as due the plaintiff from Mrs. Broyles, one of the parceners, for rent and improvements. The court disallowed all claim by the plaintiff for improvements or rent, and, declaring the property insusceptible of partition, directed its sale. The plaintiff appealed.

First, let us consider the subject of rent. Are those of the heirs who occupied the property after the end of the father's estate by the curtesy liable to pay rent, or rather compensation for use and occupation? At common-law neither a joint tenant, tenant in common, nor coparcener, occupying the common property, and thus taking more than his share of the rents and profits, can be made to account to his fellows, unless he has been appointed bailiff or receiver by his fellows. Each one has right to enter and use the land, and this fact can not be impaired by the fact that others absent themselves or do not claim their right to a common enjoyment. Unless the one in possession denies the right of the others to enter and enjoy the estate, or agrees to pay rent, nothing can be claimed of him. It is presumed that the others consent to his use. He can not call on the others to help him farm or otherwise use the property, and, in case of loss from failure of crops or other cause, he can not call on the others to contribute to the loss. If the others do not wish to occupy the premises with their co-owners, the remedy of partition is at hand, or, if the property be indivisible, the court will sell it, and divide its proceeds. Lomax, Dig. 501, 481; 2 Minor, Inst. 437, 429; Freem. Coten. § 269; note to *Early v. Friend*, 78 Am. Dec. 665. This is the view stated in Freem. Coten. § 258; *Goyle v. Johnston*, 80 Ala. 395.

By section 14, chapter 100, Code, it is provided that an action of account may be maintained "by one joint tenant, or

tenant in common, or his personal representative, against the other for receiving more than comes to his just share or proportion, and against the personal representative of any such joint tenant or tenant in common." This statute originated in England, and there and in a majority of the American states it has received the construction, which I would think the proper one, that merely by exclusive occupation and use one tenant in common or joint tenant does not become liable to account to others, but only where he receives rents or proceeds of the estate from strangers. *Freem. Coten.* § 274; note to *Early v. Friend*, 78 Am. Dec. 665; *Chambers v. Chambers*, 14 Am. Dec. 665 and note. But in *Early v. Friend*, 16 Gratt. 21, which was decided at a date making it binding authority here, it is held that one tenant in common may sue his cotenant, who has occupied the whole property, for an account of rents and profits. He is accountable whether he receives rents and profits from strangers, or receives them by occupying the premises himself, with interest from each year's close. *Rust v. Rust*, 17 W. Va. 901, holds just the same. In *Dodson v. Hays*, 29 W. Va. 577, syllabus point 2 (2 S. E. Rep. 415) this doctrine was somewhat qualified in the holding that where the property is such as to admit of use by several, and less than his just share is used by one tenant in common in a manner not hindering or excluding the others from the use of their shares, he does not receive more than his share, within the meaning of section 14, chapter 100, Code, and is not accountable for the profits of that portion owned by him to his cotenants.

But it will be observed that this statute in terms applies to joint tenants and tenants in common, and does not mention parceners. Does the statute apply by analogy to them? Its letter does not. Joint tenancy, tenancy in common and coparcenary are the three notable joint estates, and to them alike the common-law rule applied that one cotenant using alone the common property was not liable to account therefor, and the legislature in changing the rule leaves out coparceners, and expressly names joint tenants, and tenants in common. Why do this unless it intended to exclude coparceners from the statute? Could there be a stronger instance of the ap-

plication of the principal of construction that "the mention of the one is the exclusion of the other?" The lawmakers did not intend that the sister or brother remaining under the roof of the old home, or making bread from the home farm after the departure of parents, should every day be running in debt to the others. While it might be reasonable as between joint tenants or tenants in common, often strangers, it would not be so between brothers and sisters. There was reason for omitting parceners from the statute. It is humane and reasonable to assume that brothers and sisters do not object, but consent, that brothers and sisters continuing on the premises are still at home, and not expected to pay rent. Such we know to be the uniform course between members of a family. The same presumption does not hold between two who own as joint tenants or tenants in common. Thus, I think neither the letter nor reason nor the equity of the statute applies to parceners. Prof. Minor, admitting that parceners are not within the letter of the statute, says that "it is believed" that the common-law rule of non-liability has been changed by construction of the statute, partly because courts of equity before the statute of Anne in England had obliged parceners to render an account, and partly from the irresistible reasonableness of the thing, and partly because of the force of the analogy between joint tenants, tenants in common and coparceners. 2 Minor Inst. 437 (506). I have examined the authorities there referred to, and find that this opinion rests on *Drury v. Drury*, decided in the year 6 of the reign of Charles I., which does seem to sustain the position, as it makes one of two heirs account to the other heirs; but the report in 1 Ch. R. 48, 49, is so meager that we can not tell how far the element of ouster or exclusion may have entered into the case. *Dean v. Wade, Id.*, decided ten years later, simply adopted *Drury v. Drury* expressly as a precedent. No facts are given. Eq. Cas. Abr. c. 2, tit. "Account" (A) p. 5, note, so far from sustaining Prof. Minor, is against his position, as it limits the equity jurisdiction to joint tenants and tenants in common, and that under the statute of Anne, not mentioning coparceners. It is but a note citing no case. Though Kent is cited by Prof. Minor, Kent does

not insert it in his text. It is an annotator's note, based on the old English case and the note in Eq. Cas. Abr. just mentioned, and the Kentucky case of *O'Brannon v. Roberts*, below referred to. Lomax refers to the same authority. Now, as to the Kentucky case cited by Prof. Minor (*O'Brannon v. Roberts*, 2 Dana 54) it supports Prof. Minor's inclination to an opinion. But examine the case. The opinion plainly shows that Judge Nicholas hesitated to hold that one parcener may be held to account in equity for profits and rents of land exclusively occupied by him, saying that St. 3 & 4 Anne, the source of ours, applied only to joint tenants and tenants in common, but he felt bound by a former Kentucky case (*Graham v. Graham*, 6 T. B. Mon. 562 (17 Am. Dec. 166)). When that case is examined, it has nothing whatever to do with the point, for it was a case where one child claimed exclusively in severalty as purchaser of their father by a forged title bond. It was a case of ouster, where one heir shut out another by adverse claim. The syllabus itself states that he held in severalty. I must refer to *Chinn v. Murray*, 4 Gratt. 348, cited by Minor. It is peculiar. A judicial partition was made in 1820, which lay unconfirmed till 1836, and on an appeal as late as 1848 it was reversed. The parties took possession and improved the parcels under the partition as their own. Improvements were allowed as far as they added to the present value, and rents and profits were charged, or rather set off. This case can not be said to hold the clear proposition that a coparcener, merely from occupation of the premises, receives more than his share, under the said Code section, by construction. It is a case of charge to offset improvements, which I elsewhere say can be done. The parties had to be allowed improvements, because made under the mistaken belief that they owned the parcels in severalty, under a partition so long acquiesced in, and, claiming improvements, they must be charged for use and occupation. Where it is proper to allow improvements, rents and profits should be charged. Where it is proper to charge rents and profits, improvements should be allowed. The decree in the case says that, "under the circumstances of the case," justice required an allowance for improvemnts, and

then said that rents and profits be charged. The opinions do not touch on the point. They do not consider whether the said statute naming joint and in common tenants includes within its equity coparceners. The matter was not discussed, not even mentioned. The Virginia cases sustaining an account are cases of joint tenants and tenants in common. So the two West Virginia cases cited above. If there is a case in either state pointedly holding that a mere sole use by a coparcener subjects him to account, I have not seen it, except *Fry v. Payne*; 82 Va. 759 (1 S. E. Rep. 197) holding, by a mere remark, a parcener liable to account for sole use; but there was no consideration of the point whether the statute applied to parceners, but it was assumed it did. The distinction between parceners and joint tenants or tenants in common was not thought of.

So, I do not think these parceners could by law demand an account of use and occupation. But, in addition, all the parceners, save one, including the plaintiff, by uniting in the form of a letter signed by all as an agreement, declared that they did not wish the hotel to go into the hands of strangers, and wished Broyles, then in possession, not to leave it, but to keep it and use it, and insure and paint and repair it. and, after all the improvements contemplated by it had been made, if he thought the heirs were entitled to anything he could pay; but if he thought they were not, then pay nothing, leaving it to him, and they would be satisfied. This was April 17, 1884. It spoke no intent to charge back rent, but by plain implication disclaimed it, and disclaimed an intention to charge in future. The suit would not change this. Mrs. Broyles still had right till partition or sale, so she did not exclude an actual effort at entry and enjoyment by others. Let the question of liability for use and occupation be settled as it may on general principles of law. This agreement in this case repels a charge.

Next, as to improvements claimed by L. E. Ward. Can he be allowed for them? One joint tenant or tenant in common at common-law could compel others to unite in the expenses of the necessary reparation of a house or mill owned by them, though the rule is limited to three parts of the common prop-

erty, and does not apply to fences enclosing wood or arable land. This right was enforced by a writ *de reparatione facienda*. It did not apply to past repairs, and could only be resorted to after request to unite in the repairs and refusal. 1 Lomax, Dig. (504) 648; 2 Minor, Inst. 430; 4 Kent. Comm. 370. It was confined to a mill or houses, because it is for the public good to maintain houses and mills, which are for the habitation and use of men—as Lord Coke said in Co. Litt. 200b; *Id.* 54b. “If there be two joint tenants of wood or arable land, the one has no remedy against the other to make inclosure or reparation for safeguard of the wood or corn. *Bowles’ Case*, 11 Coke, 82. I have no doubt this old common-law writ, though disused, might yet be resorted to. It applies to future, not past, repairs. Freem. Coten. § 261; *Calvert v. Aldrich*, 99 Mass. 76. I think it can be safely laid down, with the exception stated, no joint tenant, tenant in common, or parcener can compel his cotenant to make improvements, or maintain an action against him personally to compel him to contribute to the expense of improvements made upon the estate, without his consent, express or implied, or fix it as a lien on his interest in the estate. One cannot improve his fellow out of his estate. He has voluntarily put improvements upon land of another, knowing his right, and he can not impose a debt on him or his estate without his consent. Freem. Coten. §§ 261, 262; *Aldrich v. Husband*, 131 Mass. 480; *Id.* 135 Mass. 317; *Nelson v. Cluy*, 23 Am. Dec. 387; *Hancock v. Day*, 36 Am. Dec. 293; *Scott v. Guernsey*, 48 N. Y. 106; *Calvert v. Aldrich*, 99 Mass. 74; *Mumford v. Brown*, 16 Am. Dec. 440. It is not the case of one making improvements in good faith believing the land to be his. The common-law denied such a one relief, and it is only allowed by statute. Code, c. 91. It seems that, where a tenant in common or joint tenant is called on for rents and profits in equity, he may deduct ordinary repairs on the principle that he who asks help from a court of equity must do equity. *Hannan v. Osborn*, 4 Paige 343; *Ruffners v. Lewis*, 7 Leigh 720, 743; 2 Minor, Inst. 420; 1 Story, Eq. Jur. § 655; *Graham v. Picree*, 19 Gratt. 28, syllabus 6; Freem. Coten. § 279. Where partition is made, the part improved should, if not prejudicial to others, be allotted to the one who

made improvements, estimating its value without improvements. 2 Minor Inst. 420; *Patrick v. Marshall*, 4 Am. Dec. 670; *Nelson v. Clay*, 23 Am. Dec. 387. But, if this can not be done, he to whom the improvement falls does not have to pay for it. *Nelson v. Clay*, *supra*. Where improvements are made with consent of the cotenants, they are personally bound, and the demand is a lien on their shares. *Houston v. McCluney*, 8 W. Va. 135; Freem. Coten. § 262.

It seems to be claimed in the brief of counsel that the letter to L. M. Broyles, written by some of the heirs, justifies a charge by L. E. Ward for improvements. After requesting him not to leave the house, but to stay, it recited what he ought to pay, *viz.* keep and use the property, have it insured, keep taxes paid, keep the house in good repair; and then said "Go to work and have the house painted and repaired as in your opinion you think it should be; and, after all this improvement, has been made, if you think, after calculating the expenses of the improvements and the taxes, *etc.*, which you may have paid heretofore, that the heirs are entitled to anything, then you can arrange and pay them their proportion; and if you think that nothing is coming to the heirs after paying for painting, *etc.*, then we are satisfied." This did not refer to improvements made by L. E. Ward before the letter, but to future improvements. The word "paid" refers to taxes. Although it be law that one coparcener can not without consent make permanent improvements, and charge his coparcener or his share with their cost, where the estate is partible in kind, as a tract of land, how is it in the case of a house or land which is impartible in kind for any reason, so that it has to be sold in order to effect a partition, as was the case in the present instance? Is there no difference here? Circumstances alter cases. Is it right for a court of justice to sell the land greatly increased in value by the expenditure of one brother, and put the money into the pocket of another with its eyes shut to the fact that the property brought more, a great deal, by reason of the new house built by one of the brothers? Ought it not to be ascertained how much the value was enhanced by the improvement, and pay the amount of the enhancement to the one whose means produced it, and

divide the balance? This is different from the case where there is division in kind. In the latter case, to charge the brother who did not consent to the improvement is to force upon him a debt he did not assent to, and to mortgage his estate with a debt which he can not pay and which will take away his patrimony. One ought not to be made a debtor without his consent; but, where the whole is to be converted into money and distributed, another principle is admissible, doing harm to no one and justice to all. The others get just what they would have received without the improvements, and the one making them is reimbursed. I have observed that in Illinois this doctrine has been frequently applied. *Louvalle v. Menard*, 41 Am. Dec. 161, and note; *Howey v. Goings*, 54 Am. Dec. 427; *Dean v. O'Meara*, 47 Ill. 120. And on further search I find this exception approved in *Moore v. Thorp*, 16 R. I. 655 (19 Atl. 321). I think *Elrod v. Keller*, 89 Ind. 382, would also allow it in such a case as we have in hand. *Alleman v. Hawley*, 117 Ind. 533 (20 N. E. Rep. 441) does. It does not follow that the original cost of improvements be given, but the actual enhancement of value at time of sale by reason of improvements is ascertained. See opinion in last cited case, and in *Moore v. Williamson*, 10 Rich. Eq. 328. The opinion in the last case very properly says that if the cost of improvements be allowed, "it would subject the owner to the want of judgment or economy of the improver, and render him liable to be built out of his land by the improvidence of his tenant." I would add that the improvement may have depreciated from some time before the sale.

It is objected that the bill does not charge a request on the part of the cotenants for the improvements. It would be necessary to charge them otherwise than as indicated above, but it is not necessary to so charge them; that is, as a simple increase of value.

It follows from what has been said that, while there could be no claim for use and occupation against Broyles and his wife, yet the decision of the court below is wrong in wholly disallowing all claim for improvement made by the plaintiff out of the proceeds of sale, in the manner above stated, which

was directed to be made because the property was found insusceptible of partition.

A reference was made to a commissioner, and his report charged rents and profits to Mrs. Broyles for the hotel, and to the plaintiff for the stable, and charged Mrs. Broyles, as the owner of five-sixths of the property, with five-sixths of the money spent by the plaintiff in improvements. The commissioner made a part of his report a deposition of the plaintiff, and, as the report imports, there was no other oral evidence before him. Taking that deposition alone, it supports the report as to the charge for improvements, as it shows consent on the part of the cotenants. No exception was made within ten days, and the plaintiff contends that the result reached and returned by the commissioner must be taken as correct, and can not be impaired by after exceptions and evidence afterwards taken, and that the court could not, upon depositions afterwards taken, overturn and reject the result reached by the commissioner, but must confirm or recommit. *Ward v. Ward*, 21 W. Va. 262. The plaintiff's deposition must be considered a part of the report—a part of its face. *Lynch v. Henry*, 25 W. Va., opinion page 424; *Kester v. Lyon*, 40 W. Va. 161 (20 S. E. Rep. 933.) It is plain that if we decide the exception only by the face of the report, including that deposition, we must overrule it, because the deposition sustains the report in the point of view of fact. But after the report, and we will say after the exception, the defense took depositions. They deny the statement of the plaintiff's deposition, that the other heirs agreed that the plaintiff make the improvements. The court read them on the hearing. Could they be read to impair the finding of the report in favor of the plaintiff as to the improvements? This may seem at first an immaterial question, since as above stated, the plaintiff ought to be allowed out of the sale an amount equal to the amount of increase of value at the time of sale imparted to the property by the improvements; but a second thought makes it material, in this: that if there was an agreement between the parties that the improvements be made, that would entitle the plaintiff to perhaps a larger recovery, that is, the original cost of im-

provements with interest from date when made, while if there was no request, he would get out of the sale the mere increase of value. Can these depositions be read then? If there had been no exception, they could not, as, without exceptions, a report is taken, as to adult parties, to be correct, and will not be examined by the court except for errors on its face. *Kesterv. Lyon*, 40 W. Va. 161 (20 S. E. Rep. 933.) But where there is an exception, but not within ten days, how is it? Where the party says that he does not intend to be regarded as admitting the correctness of the report, but excepts to it, and appeals to evidence subsequently presented in the case, can he overthrow the report with that evidence? Is he unalterably bound by the report, if not erroneous on its face? If he had excepted within ten days, he could have taken other evidence, and the commissioner could retain the report to await it, and upon it make remarks, or even make a further or amended report. I think this is so because section 7, chapter 129, Code, says that if exceptions be taken within ten days, the commissioner shall with his report "return the exceptions, and such remarks thereon as he may deem pertinent and the evidence relating thereto." Judge Green expressed the same opinion in *Lynch v. Henry*, 25 W. Va. 423. I have some question as to the last matter, but think it tenable, and that the rule may be convenient in practice. The Code, after providing for exceptions before the commissioner within ten days, goes on to add: "But any party may except to such report at the first term of the court to which it is returned, or by leave of the court after such term." What does this mean? It may be asked of what use such exception, if evidence taken after the return of the report can not be read? The answer can be given, that the party may think the commissioner has reached the wrong conclusion on the evidence, and, desiring to have it reviewed, desires to except to get rid of the admission of its correctness which would operate against him from silence, and designs to ask the court to review the evidence, if it has been made part of the report, and, if it has not been, then to ask the court to order the evidence to be certified to be read with his exception, which he may do if he has been prevented from excepting within the

ten days. *Arnold v. Slaughter*, 36 W. Va. 590, syllabus point 4 (15 S. E. Rep. 250).

If we say that after a report has been made a party may go on and take depositions, and have them read, we introduce confusion in practice, install a bad practice, and put a premium upon negligence and delay. A case is referred to a commissioner. He gives notice, and proceeds to execute the order of reference. The parties ought to attend before him. They can be much better heard upon the facts before a commissioner than in court. It is the most important proceeding in the case, save, perhaps, the final hearing; in many cases even more important than that. If the action of the commissioner is unsatisfactory, the party can, within ten days after he has finally announced his conclusion by a completed report, except, and, if he does not want more evidence, ask the commissioner to certify the evidence to the court for its review; and if he is surprised at the inferences drawn by the commissioner upon that evidence, and thinks he can strengthen his case by additional evidence, he can except within ten days, and take more evidence, and under proper circumstances, the commissioner will delay returning his report to enable the party to do so, as the statute giving him right to take such evidence ought to be liberally construed to promote a fair, full hearing; and then the commissioner can report on such evidence, or make an amended report, or send up his original report, the exceptions, and all the evidence, old and new. After all the toil before a commissioner, after he has given his decision, and after the full opportunity for a hearing before him, a negligent litigant ought not to be allowed to reopen the case, often to the inconvenience and surprise of the other party. If so, where the utility of this tedious hearing before that important auxiliary of the court, the commissioner? It would be an almost meaningless performance. We do not think the Code means such an reopening by giving right to except at the first term after the report. We think such after taken depositions can not be read on the hearing to impair the report, as was done in this case. We think the only office they can perform is to support a motion for a recommital of the report, or to suggest

to the court, where it appears contrary to justice to confirm the report, the propriety of such rehearing before the commissioner; but on such evidence the court can not overturn the report, or remodel or restate the account, which may work great injury and surprise to the other party, but must recommit the report, if dissatisfied with it. *Ward v. Ward*, 21 W. Va. 262.

I have said this much upon this matter of commissioners' reports because of the importance, in every day's practice, of proper understanding as to proceedings before commissioners, and the frequent controversies arising upon them. Under these views, it would have been error to overturn the report, based on the theory that the improvements were made with the consent and agreement of the coheirs, but for the fact that the bill and amended bill have no allegation that the coheirs requested such improvements to be made or consented thereto. As this was not charged, the finding of the report is error apparent on its face, and vindicates the action of the court against the argument that only by using the after taken depositions it rejected the finding of the report. Does it thence follow that the total disallowance of anything to the plaintiff is justified by this omission in the bills? By no means. The bills charged the fact of the improvements, and that the hotel property itself was not susceptible of partition, and must be sold, and the same decree which disallowed all compensation for improvements subjected the property to sale in order to divide its proceeds, and upon those facts the plaintiff was entitled to something on the principle of increased value above stated. Nor ought the court to have confirmed the report and decreed its full finding, because it allowed, not an amount for increased value, but the account of expenditure by the plaintiff in improvements, and because it charged use and occupation. There ought to have been a recommittal to ascertain the amount of increased value, viewing the case on those facts. The court could not make a new statement. If the plaintiff amended his bill by the allegation wanting, he could have claimed the account filed by him, with interest, if he could succeed in sustaining the theory or contention that his co-

parceners agreed to the making of improvements by him, but without such allegation he could not. He can still amend his bill to that effect, if he wishes to do so.

It is contended that in no view can the plaintiff claim anything at all for the improvements, since they were made in 1879, while the father yet lived, and his estate by the curtesy existed, and the heirs had only an estate in reversion, not in possession, and the improvements were made for and by the father. All the children, save two daughters, continued to reside in the home as a family with their father, after the mother's death, and the existence of this curtesy would not prevent any reversioner, by agreement with the others, from making improvements beneficial to the inheritance, and charging the property with them. Nor would it debar one from claiming such increase of value in the reversion or inheritance as his improvements imparted. Of course, were it shown that the plaintiff contracted with the father to make them; if the father became his debtor, his sole debtor, for them, and he looked to the father for pay—he could claim nothing from the heirs. I do not consider that the evidence at present shows such a case as enables us to say this.

So much of the decree complained of as disallows the claim of the plaintiff or Lavina Broyles or L. M. Broyles for repairs, improvements, or rents is reversed, and the cause remanded for further proceedings in respect thereto, according to principles above stated, so far as applicable, and further according to principles governing courts of equity in such case.

CHARLESTON.

CRUMLISH'S ADM'R v. SHENANDOAH VAL. R. Co. *et al.*

FIDELITY INSURANCE, TRUST & SAFE DEPOSIT CO. v. SAME.

Submitted September 7, 1894—Decided April 17, 1895.

1. ADMINISTRATOR—EXECUTOR.

An executor or administrator can not sue or be sued out of the state conferring his authority.

2. ADMINISTRATOR—FOREIGN ADMINISTRATOR.

After a foreign administrator has come into a cause by petition to assert a demand of his decedent, the domestic administrator comes by petition to assert the same demand in his name. It is proper to recognize the latter as the proper party to represent the estate, and he takes the place of the foreign administrator. In such cases, orders or decrees rendered before the domestic administrator became a party do not bind him.

3. CHANCERY PRATICE—PETITION—REHEARING.

A person who comes for the first time into a pending cause by petition, and is a proper person to file such petition, may have prior erroneous orders in the cause reheard and corrected, upon prayer for that purpose in his petition, whether the case be proper for a petition for rehearing or bill of review in the case of a party to a cause.

4. JOINT STOCK COMPANIES—STOCKHOLDERS—STOCK CERTIFICATE.

One who subscribes and pays for stock in a joint-stock company is a stockholder, though he have no certificate of stock.

5. *Res Adjudicata.*

In a suit involving, among other things, a debt between two corporations, a decree is rendered for a certain sum in favor of the one against the other, ascertaining the amount of the liability on the basis of the amount of paid-up stock of the creditor company. That decree is *res judicata* and estoppel between the companies as to the amount of recovery, and also as between the creditor company and its stockholders, and also between such stockholders as regards the amount of the recovery, but not as to the amount of paid-up stock in settling the rights of stockholders in the distribution of the fund arising from the debt so recovered.

6. RECEIVER—COMMISSIONS—COMPENSATION.

There is no fixed rule in this state as to the mode of allowing

40	627
41	571

40	627
44	180
44	181
45	569
45	672
45	673

40	627
44	434

40	627
47	29

40	627
56	425

40	627
158	246

compensation to a special receiver, whether by way of commission or a fixed sum. Usually, when the fund is large, a lump sum is proper. The amount and mode of allowance are within the sound discretion of the court, under the circumstances of the particular case, subject to review on appeal.

7. RECEIVER.

Where a decree appointing a special receiver is reversed wholly, without any reservation, his office ceases with reversal.

8. RECEIVER—RECEIVER'S BOND

A receiver has no power or title until he give the bond required of him.

9. RECEIVER—COUNSEL FEES.

A special receiver may be allowed fair and reasonable fees paid to counsel necessary in the execution of his receivership. Courts ought to authorize employment of counsel where it is intended to give such power, and they are indisposed to allow such fees without previous authority to incur them given the receiver.

10. RECEIVER—COUNSEL FEES.

The amount of such counsel fees is within the sound discretion of the court, subject to review on appeal. Such fees are allowed to the receiver, not the counsel.

11. RECEIVER—EXPENSES

In the absence of authority previously given, expenditures to be allowed a special receiver must be reasonable, and such as are proper, essential, and necessary in the due and ordinary execution of his office, and such as were contemplated in his appointment and according to the nature of his business. In extraordinary cases, involving a large outlay of money, the receiver should always apply to the court in advance, for authority to make it.

12. JOINT STOCK COMPANIES—STOCKHOLDERS—DISTRIBUTION OF ASSETS.

Those claiming as stockholders the right to participate in the distribution of the assets in the winding up of the affairs of a private corporation must produce some satisfactory evidence of a present, subsisting interest.

13. CORPORATIONS—EXTRAORDINARY EXPENSES—BONDS.

A corporation has but one asset; namely, a decree for a certain sum against a railroad company, and a decree for the sale of its railroad, etc., to satisfy the same, after first satisfying prior liens and charges to a large amount. The creditors and owners of a greater part of the stock may, if they see fit, give to outside parties, out of the amount decreed to them, a bonus for a guaranty that at the commissioner's sale the railroad, etc., shall be made to bring at least enough to pay their claim, as well as the prior liens and charges. And, if such bonus is made to appear to have been that without which neither creditors nor stockholders would have received anything, then the court

will charge the fund thus brought into the cause with the payment of such bonus, and, after the payment of the creditors, distribute the surplus, if any, among the stockholders according to their respective interests.

14. CONTINGENT FEES.

The payment of large contingent fees can not be provided for by the court, no matter how great and peculiar their merit may be. That, as far as lawful, must be left as a matter of express contract between client and attorney.

15. COMMISSIONER—COUNSEL FEES—TRUST FUNDS.

The practice of allowing to trustees, complainants and receivers, and their counsel, large and extravagant counsel fees and commissions, payable out of trust funds under the control of the court, commented on and disapproved.

W. M. STUART, JR., U. L. BOYCE and BARTON & BOYD for appellants.

HOLMES CONRAD, MARSHALL McCORMICK, D. B. LUCAS, FRANK P. CLARK and A. W. McDONALD for appellees.

W. M. STEWART cited 36 W. Va. 465; 85 Pa. 470; 29 Gratt. 763; 80 Va. 105; 27 W. Va. 1; 16 Md. 446; 11 S. E. Rep. 1063; 14 Gratt. 229; 14 Mass. 243; 17 Mass. 368; Well's Res Adjudicata 316; 33 Cal. 394; Cook's Stock & Stockholders, § 10; Gluck & Becker, Receivers of Corporations 36; High on Rec. § 121; 29 Gratt. 602; 21 W. Va. 124; Code, c. 133, s. 28.

R. T. BARTON cited 20 Am. & Eng. Enc. Law 111; L. R. 14 Eq. 322; Kerr on Rec. 221; 28 W. Va. 623; 33 W. Va. 761; 37 W. Va. 143, 486, 571; 35 W. Va. 518; 10 W. Va. 250; 131 U. S. 332; 33 W. Va. 152; 36 W. Va. 465; 33 W. Va. 158; 19 W. Va. 167; 16 Gratt. 116; 24 Gratt. 548; 22 Gratt. 769; Code, c. 129, s. 7; 2 Dan'l Ch. Pr. 1296; 80 Va. 191; 12 W. Va. 213; 9 W. Va. 434; 10 W. Va. 298; 20 W. Va. 244; 78 Va. 164.

MARSHALL McCORMICK cited 85 Va. 9; 131 U. S. 319; 135 U. S. 533; 32 W. Va. 244; 21 Gratt. 373; 76 Va. 160; 1 Bart. Ch. Pr. 492; 16 W. Va. 378; 93 U. S. 352; 113 U. S. 116; 27 Gratt. 928; 7 W. Va. 390; 75 Va. 508; 76 Va. 200; 1 Bart. Ch. Pr. 271; 2 Wall. 94; 95 U. S. 160; 31 Gratt. 550; 80 Va. 30.

HOLMES CONRAD cited 128 Mass. 194; 28 W. Va. 623; 32 W. Va. 244; 33 W. Va. 761, 775; 32 W. Va. 271.

D. B. LUCAS cited 36 W. Va. 465; 33 W. Va. 159; 26 W. Va. 710; 14 W. Va. 1; 21 W. Va. 698; Code, c. 54, s. 82, par. 2; 16 S. E. Rep. 564; 13 W. Va. 314; 10 W. Va. 250; 20 W. Va. 331; Id. 230; 25 W. Va. 692; 29 W. Va. 695; 26 W. Va. 583, 710; 22 W. Va. 509, 510; 101 U. S. 688; 26 Bar. 88; 16 S. E. Rep. 544; 35 W. Va. 103; 33 W. Va. 152; 135 U. S. 544; Herman, Estop. 165; 32 W. Va. 159, 761, 774; 36 W. Va. 465; 14 W. Va. 1; 21 W. Va. 698; 1 Greenl. Ev. § 558; 2 Dan'l Ch. Pr. 1321; 8 W. Va. 174; 10 W. Va. 298; 12 W. Va. 371; 27 W. Va. 387-92; 35 W. Va. 36, 39; Herm. Estop. §§ 1022, 1039, 800.

A. W. McDONALD cited 1 Smith Lead. Cas. 997; 19 Am. & Eng. Enc. Law 271; 33 W. Va. 761; High. Rec. § 806; 6 Paige 213; 20 Am. & Eng. Enc. Law 76.

For statement of facts see opinion of BRANNON, JUDGE, page 648.

HOLT, PRESIDENT:

In reviewing this case I have patiently followed the points involved down to minute details with an expenditure of time that would be manifest by giving such details, but that would encumber this opinion with a mass of statements and figures which could answer no useful end.

The conclusions reached are the following: *First.* The Jewett receipts for payment of one hundred shares of stock are already in the name of John P. Logan, by certificate No. 6, for one hundred shares, issued to him as assignee, on the 19th day of February, 1873. *Second.* There is a high degree of probability that the receipts of payment taken in the name of R. D. Barclay made for stock, say twenty thousand dollars by Col. Thomas A. Scott from 22d September, 1870, to 9th August, 1872, are not, and have not been since the 15th day of September, 1874, subsisting outstanding evidences of his ownership, legal or equitable, of that amount or any amount of the stock of the Central Improvement Company. At any rate, from some cause, whatever it may be, Col. Scott's estate is not made to appear now to be the owner of any stock in the Central Improvement Company. *Third.* The Central Improvement Company owed its creditors the

sum of three hundred and eighty one thousand nine hundred and ninety six dollars and seventy one cents. It had a decree against the Shenandoah Valley Railroad Company for seven hundred and ninety one thousand three hundred and thirty eight dollars, with interest from the 1st day of July, 1890, till paid—and it had nothing else; but there were liens and charges against the railroad, *etc.*, of the railway company decreed to be sold, of higher dignity, and first to be paid, amounting to six million and six hundred thousand dollars. This was in the stringency of 1873, and, unless some one could be induced to bid something over the amount of this prior lien, then the Central Improvement Company would have of assets not one cent. All the creditors thought it wise and best to give parties who were able to buy a bonus of two hundred thousand dollars, afterwards reduced to one hundred and sixty thousand dollars, to make the property bring seven million and one hundred thousand dollars or over. One hundred and thirty four out of one hundred and thirty eight in value of the stockholders thought this the best—the only—thing to do, and did it in an informal way. The only one who complains is one stockholder, who has about one and thirty nine one-hundredths of the stock; say, four thousand one hundred dollars. He knew of the arrangement in its making and accomplishment, but stood by without assent or dissent. He also knew that his otherwise insolvent corporation was largely in debt. It was no error in the court, under such circumstances, to charge his stock with its proper proportional part of this item of expense.

I have no question but that the Jewett stock is already in and allowed to John P. Logan. Logan was not a subscriber; Jewett was, with receipts for his one hundred shares, containing the following: "This receipt to be surrendered upon receipt of stock." So that these receipts were evidence of the ownership of stock, and were used to transfer and pledge and deposit as collateral for loans, just as the certificates were. Jewett, about that time, and at the time of his death, in the early part of November, 1875, was hard pressed; "and at his death his estate was in a very complicated condition, and his securities were scattered everywhere, and it was

with great difficulty that we could ascertain really what he had. We had to go round personally to the different banks and places where his securities and papers were hypothecated to get any information about them at all." (Exhibit of William M. Stewart, Sr., one of his executors).

Logan gave a note for five thousand dollars for his purchase of stock. He found the note in bank indorsed by Judge Jewett, and, when he paid it, the money was put to Judge Jewett's credit, and the certificate of stock was issued to Logan himself, on the 19th day of February, 1873. The treasurer's memorandum on his books shows that receipts of payment of some one were used. Whose receipts of payment for the one hundred shares of stock were used if not those of Jewett? His receipts of payment were never taken up and money returned. There was only one hundred and thirty eight thousand dollars in all. One hundred and thirty four thousand dollars including the Logan five thousand dollars, are accounted for; and now to allow this to Jewett's estate runs the amount to one hundred and thirty nine thousand dollars, which can not well be so if the treasurer's official report of money paid in on stock, proved by his deposition in this case to be correct, is to be taken as true. It is no answer to say that in reaching this conclusion the court would be taking a mere conjecture, based on probability. Courts, in determining facts, act upon nothing else but probabilities of more or less cogency and convincing power. In fact, all human conduct and belief is based on probabilities. All that we have to see to is that we do not go by what is called "mere conjecture"—an inference based on presumptive evidence so slight, so non-exclusive of other reasonable modes of explanation, as to amount to a mere suspicion or surmise; a thing based on feeble or scanty evidence. There is nothing to contradict this but the fact that he once had receipts which can not now be found. This is because these executors have overlooked in the wrong place, and not in the right place, that is, among the file of receipts surrendered among the papers of the company, if such things were preserved. I will illustrate the distinction by the Scott claim of stock in

this case. When I started to examine this record, and to read and re-read the evidence, and to scrutinize the transcript of the treasurer's book of issue of certificates of stock, my attention was arrested by the following, all on the one page (258) as follows:

Page 258. No. 15. 133 shares.
 Issued to M. Baird. 8—6, 1874.
 Received certificates as above described.

M. Baird,
 By M. Baird & Co., in liq.,
 Per W. C. Stroud.

Transferred to No. 30, Canceled.

No. 16. 267 shares.
 Issued to Burnham, Parry, Williams & Co.
 8—6, 1874.

Received certificates as above described.

Void—Not issued, J. P. G.

No. 16. 267 shares.
 Issued to Burnham, Parry, Williams & Co.
 8—16, 1874.

Received certificates above described.

Burnham, Parry, Williams & Co:
 Per W. C. Stroud.

Here we have the receipts of payment of twenty thousand dollars for four hundred shares of stock presented by M. Baird and Burnham, Parry, Williams & Co., acting by one W. C. Stroud, neither of them apparently original subscribers, but M. Baird holding and presenting through Stroud such receipts to the amount of six thousand six hundred and fifty dollars, and Burnham, Parry, Williams & Co. holding and presenting such receipts to the amount of thirteen thousand three hundred and fifty dollars. No original subscriber subscribed to either one of such amounts.

If we stop at this point, it would be a mere conjecture that these were the Scott receipts of payment of twenty thousand dollars for four hundred shares of stock, receipted for in the name of Barclay, the manager of his private business, and it remains conjecture by itself. On the 13th day of April, 1874, and down to the 29th day of August, 1874, when he resigned,

R. D. Barclay was the president of the Central Improvement Company. In the suit in chancery, by bill for injunction of the County Court of Jefferson county, W. Va., against Thomas N. Ashley, secretary of the Shenandoah Valley Railroad Company, J. Edgar Thompson, trustee, Matthew Baird, Central Improvement Company, and the Shenandoah Railroad Company, the writ of summons was served on said Barclay, as president of said company, on the 13th day of April, 1874, in the city of Philadelphia, the place of his residence, and with it was an order of injunction restraining J. Edgar Thompson, trustee, also Matthew Baird, as well as William McClellan, the president of the Shenandoah Valley Railroad Company, from assigning certain mortgage bonds, but they were required to hold them subject to the further order of the court; also restraining Phillip Collins, proxy of the Central Improvement Company, and any and all other persons, from representing or claiming to represent the stock of the Central Improvement Company in the stockholders' meeting of the said Shenandoah Valley Railroad Company to be held on the 7th day of April, 1874. On the 13th day of April, 1874, notice was served on R. D. Barclay, the president of the Central Improvement Company, that on Tuesday the 21st day of April, 1874, at the hotel of D. Adams, in Luray, Page county, Va., and at other places, certain depositions would be taken. In that bill it was charged that Thomas A. Scott was the president of the Shenandoah Valley Railroad Company, and was also the owner in substance, if not in name, of forty thousand dollars in the stock of the Central Improvement Company; "that this stock now stands on the books of said company in the name of R. C. (D.) Barclay, the president of the said Central Improvement Company;" and that the contracts attacked between the railroad company and the improvement company were for that reason void. Barclay did not put in the answer of his Central Improvement Company as its president, as he was called on to do, but resigned the presidency on the 29th day of August, 1874, and Phillip Collins was elected as president in his place. Thomas A. Scott was still alive, for he did not die until 1881.

The new president, Phillip Collins, sought information and

knowledge on this vital point, so that he might make answer to this charge, and prepared and filed his answer, signed with his name, as president of the Central Improvement Company, to which he affixed its corporate seal, on the 15th day of September, 1874, accompanied by his affidavit, sworn to and subscribed on the 19th day of September, 1874, that the same was the seal of the Central Improvement Company, and the above attestation of the same was his signature; and his answer on that point is as follows: "It is admitted that the said Thomas A. Scott was president of said company (Shenandoah Valley Railroad Company) and Jonas W. Walker, vice president, when said contracts Nos. 2 and 3 were made; but it is not admitted, but denied, that said Scott was then, or ever has been a stockholder in the Central Improvement Company." It is still mere conjecture that W. C. Stroud presented these Scott receipts of payments on the 6th day of August, 1874, and obtained certificates Nos. 15 and 16; but it is certainly a circumstance in the case tending to show that the estate of Col. Scott does not now show itself to be the owner, legal or equitable, of four hundred shares of stock; and I use this only to show how readily they might pass into certificates issued in some other name. Are we to be told that Col. Scott at some time from the 29th day of August, 1874, to the 15th day of September, 1874, deliberately told Phillip Collins, president of the C. I. Co., that he was not a stockholder in the C. I. Co. when he was in fact the owner of four hundred shares? He knew it was the right of Collins to ascertain the truth, and make it known to the court, and it would take a good deal to convince me that Col. Scott misrepresented that fact to Collins, especially when the bill of injunction was served on the parties—on the 9th day of April on Collins, on the 7th of April on R. D. Barclay, on the 13th of April on U. L. Boyce, on A. K. McClure on the 7th of April, on Wm. McClellan on the 14th day of April, on Thomas N. Ashby on the 7th of April, on J. Edgar Thompson and Matthew Baird on the 13th day of April, 1874; and Collins' answer was completed and signed, sealed and attested, on the 19th September, 1874. That he did so is highly improbable. He had never accepted the four hundred shares. It

was put, from the start, in the name of his deservedly trusted agent, R. D. Barclay, for the use of the Penn. R. Co., or for some other person, or for whomsoever he might direct. So that he answered Collins truthfully that he never was the real owner. Mr. Barclay says that Col. Scott had full and complete access to those receipts of payment; that he would not have been obliged to call on him for this evidence of stock in order to deliver it to a purchaser. He had full access to it, and the right to do with it as he pleased. But Mr. Barclay, when questioned by McKeehan and the son and one of the executors of Scott, replied "that it had been so long ago that he had no recollection whether Col. Scott had any stock or not." When they asked Capt. J. H. Green, he said: "He didn't remember anything about it; it was so long ago." This was after the decree had been entered in this suit directing a commissioner to ascertain and report who were the owners of the Central Improvement Company's stocks, a suit which they both knew was pending. Mr. Barclay kept no accounts or memoranda of any kind, took no list, made no inventory of the securities he turned over *in solido* to the executors of Col. Scott in the summer of 1881. Now, after studying about it, he has the impression that these receipts were among the securities of Col. Scott which he turned over to his executors.

The evidence shows that these securities were kept together. They were in the aggregate of great value. Can any one convince us that they have not been carefully looked through again and again, or that it is any great task to search through them for an envelope carefully endorsed, "Central Improvement receipts;" for Mr. Barclay testifies that "he did not know how to 'keep books,' in the general acception of the term;" that "he had charge of Col. Scott's personal business, as distinguished from his official railroad business, from the 1st of November, 1862, until the time of his death, which occurred in May, 1881;" and that such a thing as keeping regular books for Mr. Scott was never done. "I never kept books like these or anything of the sort. When I got a receipt of that sort, I simply put it in an envelope, and on the back of it I put, 'Central Improvement Co. receipt,'

and put that, you understand, in the safe; and then I would get another one, and would put that in. That is the way it was done." This gentleman, who, from his whole testimony shows that he deserved the confidence for honesty and integrity which Col. Scott reposed in him, also shows us with complete frankness that his ten-years inference or conjecture that this envelope was there, to be turned over to the executors with the other securities of Col. Scott, can not override the inherent probabilities, and other well-known circumstances to the contrary surrounding the transaction. In fact, it was only an impression of his, for he shows that ten years had caused his memory to grow dim. They were carefully done up, marked and placed in a safe among other securities, and ones of great value, in May, June, July, and August, 1872. Why are they not found there in 1881? There is but one probable answer. They were taken out by Col. Scott or by his direction in 1874. There is no need to hunt among the heaps of miscellaneous papers of Col. Scott stowed away, and out of the way, in trunks and boxes. Col. Barclay never put them there, nor the executor. They are what are called "securities" by these witnesses. Among them they were placed, and among them they are not to be found. If they are in the trunks and boxes, then the trunks and boxes are to be searched, and that confessedly has not been done. There is a high degree of improbability that they are outstanding. Down to October 14, 1873, one thousand nine hundred shares had been evidenced by certificates issued. Nine hundred were issued from August 29, 1874, when Capt. Green went out as treasurer, and Col. Barclay as president, down to the 21st day of February, 1880, when the three Collins certificates, of one hundred shares each (Nos. 38, 39 and 40) were issued, which were the last; making two thousand eight hundred in all, not including transfers and sub-divisions, which have to be included to bring the number up to three thousand seven hundred and fifty six, and the par value to one hundred and eighty seven thousand eight hundred dollars—a mode of counting which may mislead, and for our purpose can have no other effect. No. 20, for one hundred and thirty four shares, to D. E. Small, per John H. Small; No. 21, for one hundred

and thirty three shares, to John H. Small; No. 22, for one hundred and thirty three shares, to administrator of Charles Billmeyer, deceased, per John H. Small—were all issued on the 15th day of December, 1876. These were issued when witness McKeehan was secretary and treasurer, and Phillip Collins was president. No money was then paid, for "they had paid their money, and had receipts for the money being paid; and, upon the direction of Capt. Green, I issued those certificates to them." (Deposition of C. W. McKeehan). Same witness says the three certificates, of one hundred shares each (Nos. 33, 39 and 40), issued to P. and S. Collins, per Phillip Collins, on February 21, 1880, were the original certificates issued to Mr. Collins. "I simply tore out from the back of the book blank certificates, and filled them up." No money was then paid. "Mr. Collins had given whatever consideration he gave for his stock long before that, but they had not been issued until that time; that is, the certificates had not been issued until that time." "I did it at the request of Mr. Collins. He was the president, and signed it, and I signed as secretary." "I don't remember what the original authority was on which to make the original issue of three hundred to Mr. Collins, but it was some writing from the Pennsylvania Railroad office. It was from Mr. Barclay or Mr. Green. There was abundant authority for issuing it, as I understood it." It appears to have been paid for in 1870, as shown by books of B. H. Jameson, treasurer. All this evidence before us, scrutinized in detail, and put together, points with a very high degree of probability to the fact that these receipts of payment made by Col. Scott are not outstanding. From some cause, whatever it may be, Col. Scott's estate is not made to appear now to be the owner, legal or equitable, of stock in the Central Improvement Company and, for the purpose in hand, that which does not appear does not exist.

CHARLES MCFADDEN'S CLAIM.

After the decree was entered directing Master Commissioner Brown to ascertain and report who were the holders of the Central Improvement Company stock, and to what extent,

McKeehan wrote him several letters, asking him if he had stock, and how much, telling him that he wanted to find out all the stock that was out. These letters were written along through the year 1884, and the last one just after the entering of the above decree, as near as witness was then able to fix the date. So also, Commissioner Brown gave the usual published notice, fixing time and place for the owners to file their claims and produce evidence of ownership. It will be remembered that the amount of recovery of the Central Improvement Company against the Shenandoah Valley Railroad Company in income bonds was to be and by the court was measured and determined by the amount of the paid-in capital stock of the Central Improvement Company, and hence the importance of having it all in. Mr. McFadden saw fit to stand out, and declined to produce his evidence of ownership of stock until the amount of recovery on the above basis had been unalterably fixed at one hundred and thirty eight thousand one hundred dollars. If it is not included in that sum, about which there has been a costly and vexatious dispute, the fault, in part at least, is his, for he sat idly by without any sufficient excuse for his non-action. Now, he comes into the cause, and presents as his evidence of ownership the three following certificates of payment:

"No. 4. Philadelphia, February 5, 1872. Received of Charles McFadden, Esquire, two thousand ——— dollars, being a 1st installment of forty *per cent.* on his subscription to one hundred shares of the capital stock of the Central Improvement Company. \$2,000. John P. Green, Treasurer *pro tem.* This receipt to be surrendered upon receipt of stock."

"No. 9. Philadelphia, May 14, 1872. Received of Charles McFadden, Esq., one thousand dollars, being an installment of 20 *per cent.* on his subscription to one hundred shares of the capital stock of the Central Improvement Company. \$1,000. John P. Green, Treasurer. This receipt to be surrendered upon receipt of stock."

"No. 14. Philadelphia, June 24, 1872. Received of Chas. McFadden, Esq., one thousand dollars, being an installment of 20 *per cent.* on his subscription, one hundred shares of the capital stock of the Central Improvement Company. John

P. Green, Treasurer. This receipt to be surrendered upon receipt of stock."

The stockholders of the Central Improvement Company found by their decree for the sale of the Shenandoah Valley Railroad that in order to reach their claim of eight hundred thousand dollars they would have to bid the sum of six million six hundred thousand dollars. In this emergency they called a meeting of stockholders, formal or informal, to see if anything could be done. A committee was appointed, charged with the duty of securing a bidder for the road, and it was empowered to use the assets of the company at its discretion to accomplish that purpose. This, I suppose, would be regarded as an informal meeting of owners of stock; but there was present, either by present action or subsequent ratification, sixty seven sixty-ninths of the stock. It resulted in their securing a bidder by giving such bidder two hundred thousand dollars out of the stock thus to be realized in full. This bonus was afterwards reduced to one hundred and sixty thousand dollars, with which sum the fund in court was charged before distribution. This was done by the consent of the numerous creditors of the Central Improvement Company, whose claims were thus paid to the last cent, amounting to about three hundred and eighty two thousand dollars; and without such arrangement, neither they nor the subordinate stockholders' claim would have realized one dollar. This is shown to have been proper, and eminently wise and discreet, and under the circumstances of the hard times of 1873, fortunate. Such is shown to be the fact as far as the probabilities can show a fact by an overwhelming array of testimony, for there is no attempt to show any fact tending in any degree to establish the contrary. This was a matter for the owners, and the Court has nothing to say on the subject; but Mr. McFadden says he did not participate in forming the committee, and is not bound by their action. Surely, I can not be mistaken in saying that as against him, in order to pay the creditors of his otherwise insolvent company, the charging of the fund with this one hundred and sixty thousand dollars was right. It was also right in view of the

interests of the stockholders as against him, the only one having any interest who is heard to complain.

The court also charged the fund before distribution with attorney's fees to the amount of two hundred thousand dollars. This was based on a private arrangement for contingent fees of one-fourth and more of the recovery made between client and attorney with which, for the most part, the court has nothing to do, and as to which creditors of this otherwise hopelessly insolvent company whose claims aggregate three hundred and eighty one thousand nine hundred and ninety six dollars and seventy one cents do not complain, and which is agreed to and insisted upon as right by one hundred and thirty four in value and out of one hundred and thirty eight of the stockholders. I am not sure but what, taking into consideration the interests of the creditors of the Central Improvement Company, it was right; but we do not wish, under any circumstances, to give our sanction to a growing evil of the courts, *viz.*, without any contract between client and attorney, their charging large fees against the fund to be distributed. Therefore, we are of opinion that Mr. McFadden's claim should not be charged with any part of the attorney's fees, and in so far as the decrees complained of do so, they are hereby reversed; but in lieu thereof, reasonable, customary and proper charge, if any, on his claim, in favor of those attorneys who had for him and others the conduct of the case, should be made. With this modification to be made in the court below, the rest of the decrees complained of are affirmed, and the cause is remanded for further proceedings.

DENT, JUDGE (*concurring*):

The conclusion reached by the majority of the court on re-argument being in accordance with the true principles of equity, as I understand them, I feel in duty bound to change my dissent from their determination to a concurrence therewith, for the following reasons:

By a decision of this Court in the cases of *Fidelity Insur-*

ance, Trust & Safe-Deposit Co. v. Shenandoah Val. R. Co., and *Crumlish v. Same* (delivered March 20, 1890) 33 W. Va 761 (11 S. E. Rep. 58) the paid-up capital stock of the Central Improvement Company was ascertained and fixed at one hundred and thirty eight thousand dollars, as a basis of recovery against the Shenandoah Valley Railroad Company. By the present decision it is ascertained and fixed at one hundred and sixty four thousand dollars for the purposes of distribution. The commissioner's last report on the subject shows it to be not less than one hundred and seventy thousand dollars. The difference between the two decisions of the Court amounts to twenty six thousand dollars, which, according to the basis fixed for recovery in the first decree would, if it had been before the court at that time, increase the recovery by the sum of seventy thousand seven hundred and eighty eight dollars, being double the said twenty six thousand dollars, with interest added to a certain fixed date. This sum was entirely lost to the stockholders of the Central Improvement Company because of the ascertainment of the wrong amount by the court on insufficient data. It can never be corrected, but is finally lost, as the opinion of the Court holds that the question of recovery is *res adjudicata*. Who, then, should bear this loss? The law of estoppel is: "Where a party fails to make his rights known, where fairness and good conscience require that he should do so, to protect the interest of others, he can not be heard as against them to assert such rights." Herm. Estop. § 787. Also, *Id.* 760: "Nobody ought to be estopped from averring the truth or asserting a just demand unless, by his acts or words or neglect, his now averring the truth or asserting the demand would work some wrong to some other person, who has been induced to do something, or to abstain from doing something, by reason of what he had said or done or omitted to say or do." And the converse is true. A person who has rights which he omits to assert at the proper time and place will not be permitted afterwards to assert them if by so doing he will cause an injury or loss to another person which could have been avoided had he exercised that due diligence which a court of equity requires of all persons seeking its as-

assistance. Admitting that the basis of one hundred and thirty eight thousand dollars is wrong, yet those who by their failure to assert their claims occasioned the establishment of this wrong basis are forever precluded from disputing its truth. And it matters not whether their quiescence, neglect or silence mislead the court or other persons in interest; the result of their failure to act is the same, and they, and not those who have been attentive and active, must bear the consequences of their own negligence. "Whenever one of two innocent parties must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." Applying these recognized principles of equity, fair dealing, and good conscience to this case, what is the result?

In December, 1882, H. H. Crumlish, a stockholder in the Central Improvement Company, brought a chancery suit for and on behalf of himself and all other stockholders who would aid in prosecuting the suit, to compel the Shenandoah Valley Railroad Company to account for and pay over the assets of the Central Improvement Company, in its control. Immediately stockholders representing nearly one hundred and thirty thousand dollars became active and vigilant with their time, labor and means in prosecuting said suit, and have continued so during the whole of this litigation. They promptly made known the amount of stock held by each, and did everything within their power to get at the truth of the whole matter, and secure a prompt adjustment thereof. These appellants and those they represent, on the other hand, so far as any stock was owned or claimed by them, were in a state of absolute nonentity. No information could be obtained from them or about their ownership of stock.

Mr. C. W. McKeehan, who was a stockholder and became secretary of the Central Improvement Company in 1877, and continued as such until 1884, the books not showing, undertook, in the interest of the stockholders, to find out who were the actual stockholders in the company, and what amounts of stock each held. This was about the year 1884, and was done in view of the pending litigation. He called on the son and executor of Thomas A. Scott, deceased, and

he informed him that he knew nothing about his father having any stock, and had no evidence thereof. He saw Mr. R. D. Barclay, the former president of the company, and business manager of Thomas Scott's private affairs, and also Mr. John P. Green, formerly secretary and treasurer of the Central Improvement Company, and representative in some capacity of said Scott, and they both informed him that they knew nothing about it. It had been so long ago. These two men, who, as they afterwards testify, held the offices of president, secretary and treasurer of the Central Improvement Company from and including the year 1870, to and including the year 1874, by virtue of the stock they subscribed for Thomas Scott in their names, could not remember that he ever had any stock in the company. And he therefore concluded that Mr. Scott owned no stock. As to Judge Jewett's owning any stock, he never knew anything, neither from the books nor outside claims. He wrote several letters to the appellant McFadden, to know whether he had any stock, and if so, the amount thereof, and could get no response from him. The books and papers of the company which had been kept by Mr. John P. Green contained no information as to any of these parties holding any stock. On the 26th day of June, 1889, the deposition of this same John P. Green, secretary and treasurer as aforesaid, was taken for the third time during the progress of this litigation, for the purpose of ascertaining and fixing the amount of the paid-up stock of the Central Improvement Company, and he testifies that it was at least one hundred and twenty eight thousand dollars, and he thinks it was one hundred and thirty eight thousand dollars. Indeed, he is positive it was the last named sum. Acting on this information, this Court, as heretofore mentioned, definitely determined, irrevocably, this paid-up stock to be the latter amount. This sum, so ascertained, exceeded by several thousand dollars the amount of stock actively engaged in the prosecution of this suit. Such being the case, the holders of this stock were satisfied with this amount and were utterly without suspicion that it could be any greater sum, as they had not the least information that such stock could in any possible way exceed this sum. On the

contrary, their information was, if anything, that it was less than this sum, and that they represented almost the entire amount. Therefore, they had no reason to, and made no effort to increase the finding, either in the Circuit Court or the Court of Appeals, but, feeling safe, allowed it to become a matter of final adjudication.

After, on this basis, a recovery was had against the Shenandoah Valley Railroad Company, amounting to nearly eight hundred thousand dollars, the known stockholders actively engaged in this litigation called a meeting in the Drexel Building in the city of Philadelphia, which had been the principal place of business of said company, after having given notice thereof in a newspaper, as required by the by-laws of said company, and after doing everything they were able to do to get all the stockholders present on the 25th day of April, 1890, for the purpose of taking the necessary steps to realize on their large, but doubtful recovery aforesaid, which was regarded almost as a hopeless undertaking. These appellants and those they represent had not yet discovered their ownership of any stock. With the exception of James P. Scott they did not yet put in appearance, although from their subsequent conduct, it is not a violent presumption to hold that they or those they represent were fully aware of and had an opportunity of attending or being represented at the meeting; but they purposely abstained from so doing, because the fruit was not yet ripe for the plucking. These stockholders, believing that they had the right so to do, as the owners and representatives of all the known stock, and that they were acting in the interest of all, through the committee then appointed by them, without any objection from any source, pledged one hundred and sixty thousand dollars of this doubtful recovery for the purpose of securing the residue of six hundred and forty thousand dollars; and, as the evidence shows, they did through this pledge, beyond dispute, secure this last amount for the payment of expenses, debts and distribution among stockholders. The evidence shows indisputably that this expenditure turned what was otherwise a doubtful recovery, without market value, into a tangible fund, under the control of the court. Then, for the first

time, to wit, in February, 1891, these dormant claimants begin to show active life, and take a personal interest in this litigation. The memories of Barclay and Green, which have been heretofore so blank, are suddenly refreshed, and they can now so easily remember that Thomas A. Scott, deceased, subscribed for four hundred shares of stock in their names, and that he paid for it to said Green, through said Barclay; that Judge Jewett subscribed for one hundred shares of stock, and paid for it to said Green; and that Charles McFadden had a like subscription paid for in a like manner. This evidence, if true, was in the knowledge and under the control of these appellants, or those they represent, at the beginning of this litigation; yet they continually denied any knowledge of having any stock, or led the other stockholders by their silence to believe that such was the case. The certificate book is produced in evidence, and the stubs thereof, in the handwriting of John P. Green, show the issue of one hundred and thirty thousand dollars of stock to various parties, but none to Thomas A. Scott, Judge Jewett or Charles McFadden. This is a very significant silence. These certificates were signed by Green, as secretary and Barclay as president, both in the employ of Thomas A. Scott, although the stock was subscribed for in their names, and by reason thereof they were enabled to hold the offices and control the management of the company until its funds were all received and expended. In addition to the above, A. K. McLure paid five thousand dollars on stock, for which he received no certificate, and Joseph L. Morton paid five thousand dollars, for which he received no certificate, making a total of paid-up subscriptions, counting that claimed by appellants, of one hundred and seventy thousand dollars. But Mr. Green swears to and accounts for only one hundred and thirty eight thousand dollars. What became of the other thirty two thousand dollars? It will not do to say it was paid in labor, because the evidence does not justify it. There has been either a defalcation in the funds or an over-issue of stock, and to take the most charitable view of the matter is that while this stock was paid for by Scott and Jewett, it was afterwards transferred to and issued to some one else, the money

going back to Scott and Jewett; and Barclay and Green, who were in Scott's employ all the time, after the stock was so issued and the money returned to Scott, his two servants, no longer being stockholders, resigned their positions, because their employer had no longer any interest in said company. This is certainly a reasonable conclusion, considering the conduct of these parties during the whole progress of this litigation. But in my opinion, this matter as to whether these parties had or had not stock has nothing to do with the just determination of this case. It is very evident, with the present state of the proofs before it, that this Court, instead of fixing the paid up stock of the Central Improvement Company at one hundred and thirty eight thousand dollars, would fix it at one hundred and sixty four thousand dollars. This change has been brought about by the testimony of Green and Barclay, and the present activity of these appellants, seeking to profit at the expense and labor of others; and it is just as evident that it was in the power of these appellants to have ascertained and made known this proof before the court immutably fixed the amount of the paid-up stock on which the recovery was based; and it is their culpable negligence in not asserting their claim to stock at the proper time—that is, right at the inception of the litigation—that occasioned to the stockholders the loss of the seventy thousand seven hundred and eighty eight dollars, as before stated. On whom then, should this loss fall? The equitable law of estoppel says, as herein quoted, on him whose failure to act occasioned it; in this case, the appellants. A surety is released from payment of debt for indulgence to his principal and indorser for want of notice; and a *bona fide* purchaser for value, for neglect to record his deed, loses his land. The slight oversight of one person may result in the loss of thousands of dollars to entirely innocent parties, whom the policy of the law holds liable for his negligence.

Equity ever favors those who are prompt and diligent in the assertion of their rights, and frowns with displeasure on those who listlessly stand by during the heat of battle, and, after the smoke has rolled away, come bravely forward, and seek to deprive others of the well deserved rewards of their

vigilant efforts. As Judge Holt says in the case of *Clark v. Figgins*, 31 W. Va. 15 (5 S. E. Rep. 643): "*Vigilantibus non dormientibus jura subveniunt.*" There would be no reward to the vigilant if these parties were now compelled to step aside, and let those who stood by and did nothing take the fruits of their labor and expense, or were compelled to divide it with them." It would be paying a premium to idleness. "To the victors belong the spoils," is not an inequitable doctrine, but underneath it lies the strongest principles of reciprocity and justice. Not only did these appellants or those they represent stand idly by for almost ten years of a hard fought legal battle, but, when importuned by those whom they should have been mutually aiding and supporting, they either denied all knowledge of personal interest, or treated with contemptuous silence such importunities; and now that fortune has crowned years of labor with success, in the face of every discouragement, these laggards in the contest come bravely to the front, and demand, not alone a participation in the results, but repudiate any responsibility in the necessary expenditures by which they were achieved. Partners they would be in the profits, but not in the labor, expense, or losses. Justice and equity both require that before they share in the distribution, they should make good the loss occasioned by their culpable inertia and inequitable silence. This loss, to wit, seventy thousand seven hundred and eighty eight dollars, exceeds any share they can possibly receive in the fund, distributable, after deducting therefrom the reasonable and legitimate expense of creating it, and therefore precludes them from any share in the distribution. The finding of the commissioner and the decree of the Circuit Court, in my humble opinion, are founded on the true principles of equitable participation, and should therefore be affirmed, except as modified in the opinion of Judge Holt, in which I now concur.

BRANNON, JUDGE (*dissenting*):

When this case was decided at a former term, after the best consideration which I could give the evidence, I was of opinion that the last report of Commissioner Brown, finding

Jewett and Scott to be stockholders, is correct. I still remain of that opinion, and dissent from the action of a majority of the Court at this term, excluding them. I prepared at the former hearing the following opinion, which was then assented to by three judges:

This is an appeal taken by the administrators of Thomas A. Scott, deceased, and the administrator of Thomas L. Jewett, deceased, from decrees of the Circuit Court of Jefferson county in the two cases, heard together, of *Crumlish's Adm'r v. Shenandoah Val. R. Co. and others*, and *Fidelity Insurance Trust & Safe-Deposit Co. v. Shenandoah Val. R. Co.* By a former decision in this Court by these causes, reported in 33 W. Va. 761 (11 S. E. Rep. 58) an indebtedness was established against the Shenandoah Valley Railroad Company in favor of the Central Improvement Company, which a commissioner afterwards found to be eight hundred and twenty thousand three hundred and fifty three dollars and eighty one cents, as of February 10, 1891. After the case returned from this Court to the Circuit Court on May 30, 1890, a reference was made to a commissioner to report who were stockholders of the Central Improvement Company entitled to participate in said fund, and the respective amounts to which they were entitled, and to audit debts against said company, and to settle the accounts of the special receiver, and ascertain what would be reasonable compensation for expense incurred by him, and a fair allowance of fees of counsel employed by him. In March, 1891, the petitions of the foreign executors of Thomas A. Scott, deceased, and of Thomas L. Jewett, and the petition of Charles McFadden were filed, respectively claiming that the estates of said Scott and Jewett were stockholders and said McFadden was a stockholder in the Central Improvement Company, and entitled to participate in its distributable assets. Certain decrees were entered prejudicial to the estates of Scott and Jewett, and then Davis, as administrator *c. t. a.* of Scott, and as administrator of Jewett, appointed as such in West Virginia, filed their petitions, claiming that their decedents had been stockholders in the Central Improvement Company, and asking for their estates a participation in said fund, and praying that said decrees be re-

heard and reformed. The cases went on, resulting in a decree, not only not rehearing and reforming prior decrees complained of by Scott's and Jewett's representatives, but wholly denying to the estates of Scott and Jewett any participation as stockholders in said fund, and dismissing their petitions, and according to McFadden participation to only a partial extent of his claim; and they appealed here.

I have stated such facts as bear on the first question which I will decide, and that is whether Davis, the West Virginia personal representative of Scott's and Jewett's estates, can maintain this appeal. It is said he can not; that the foreign representatives were parties when decrees containing certain features prejudicial to said estates were made, and they alone can complain of them, that in fact, Davis can hold no place as appellant either as to those decrees made before he appeared or since, as the foreign representatives were received and recognized as parties by the court, and have never been eliminated from the case, and both a foreign and domestic administrator can not represent the estate in one suit. This contention can not be sustained. A foreign personal representative can not sue or be sued outside the state granting him authority. *Hull v. Hull*, 26 W. Va. 15; *Vaughan v. Northup*, 15 Pet. 1; Bart. Ch. Prac. 152; *Dickinson v. McCraw*, 4 Rand. (Va.) 158; Story Conf. Law § 513; *Dixon v. Ramsay*, 3 Cranch 319; *Fenwick v. Sears*, 1 Cranch 259; 1 Lomax Ex'rs 121; 1 Rob. Prac. (new) 161; *Andrews v. Ivory*, 14 Gratt. 229; 1 Lomax Ex'rs 142; *Doolittle v. Lewis*, 7 Johns. Ch. 45; *Fugate v. Moore*, 86 Va. 1049 (11 S. E. Rep. 1063). The fact may be pleaded in abatement or in bar. *Noonan v. Bradley*, 9 Wall. 394.

Without discussing what would be the effect of a decree for a foreign administrator where no question is raised, yet I can safely say that not only the defendant can raise objection, but that when a suit like this is pending, involving a fund wherein a decedent has a share to be recovered, by intervention in the case, the administrator deriving his authority in the state in which the fund is located, may come into the case and demand that his decedent's share be decreed to him, notwithstanding a foreign administrator has be-

fore intervened and claimed it; and this because it is the administrator appointed in the state where the debt is owing who alone has title to it, and therefore can sue for it, the foreign administrator having no title. When the administrator *loci rei sitae* makes his appearance in the case, and is recognized, he displaces and eliminates the foreigner. Both can not be longer recognized, and he must be recognized who has title, and whom the law recognizes. This is a suit in equity. All being before the court, can not, ought not, the court to decree the rightful party? The case of *Dearborn v. Mathers*, 128 Mass. 194, relied upon by counsel to support the position above mentioned, was a case where a foreign administrator sued and obtained a verdict, and then a new trial was asked, because it had been discovered that his letters had been granted out of the state; and the court said that the objection should have come by plea earlier, and as the granting a new trial was in discretion, and the plaintiff had after verdict and before judgment qualified in the state of the actions, and thus, before judgment, become possessed of title, and would be liable on his bond, and thus no loss could come to the defendant, a new trial was refused, and judgment rendered. There the plaintiff became before judgment vested with title by letters relating back to testator's death.

The next question is, were Scott and Jewett stockholders in the Central Improvement Company? The commissioner reported on the evidence that Scott had subscribed and paid for twenty thousand dollars, Jewett five thousand dollars, and McFadden five thousand dollars of stock, but had no certificates. I shall not here detail the evidence upon what is purely a question of fact, as I conceive that the purpose of the requirement that we shall give reasons for our decisions refers to legal principles of decision, and was not designed to encumber the Reports with mere evidence, affording no guidance in future cases, like legal principles. Suffice it to say that upon examination of the evidence, we find that Scott, Jewett, and McFadden were such stockholders. The want of certificate does not alone furnish the test of whether a person is a stockholder in a private corporation. He is a

stockholder who has subscribed for and paid for a given number of shares in its capital, as these parties did. The stock is one thing; the certificate quite another. The certificate is merely evidence, but not the only evidence of ownership of stock. The owner of stock is a shareholder without it. Cook, Stock, Stockh. & Corp. Law, § 10; *Hailey v. Upton*, 102 U. S. 314; 1 Beach, Priv. Corp. § 62.

Scott and Jewett so being stockholders, the next question is, were Scott and Jewett properly denied any share in the fund in court as the property of the corporation, the Central Improvement Company? Various arguments are made to justify such exclusion. I will state the facts which seem to me to bear on this branch of our inquiry in this case. It will appear from the former decision in this case (33 W. Va. 775 (11 S. E. Rep. 58) that the basis of recovery by the Central Improvement Company against the Shenandoah Valley Railroad Company was under a certain agreement between them, which provided that the Shenandoah Valley Railroad Company should deliver the Central Improvement Company two hundred and fifty thousand dollars second mortgage bonds of the Shenandoah Valley Railroad Company, and income bonds, measured in amount by double the amount of stock of the Central Improvement Company paid in; and, on account of the failure to deliver said bonds this Court debited the Shenandoah Valley Railroad Company with two hundred and fifty thousand dollars, with interest, on account of the second mortgage bonds, and with three hundred and seventy nine thousand two hundred and twenty four dollars on account of the income bonds, reaching the latter sum by taking one hundred and thirty eight thousand dollars as the amount of stock of the Central Improvement Company which had been paid in, with interest, and then doubling it. When the commissioner was executing a reference requiring him to report who were stockholders of the Central Improvement Company entitled to share in this money, the Norfolk & Western Railroad Company appeared to own one hundred and twenty eight thousand dollars stock (later increased to one hundred and thirty four thousand dollars), and

claimed that one hundred and thirty eight thousand dollars as stock paid in was an unchangeable, immovable given sum in the problem of distribution, and that it must get of the amount to be divided among stockholders in the proportion which one hundred and thirty four thousand dollars bears to one hundred and thirty eight thousand dollars. This would leave an open space for only four thousand dollars of stock in other hands, and would not let in the whole thirty thousand dollars of stock owned by Scott, Jewett, and McFadden. Their thirty thousand dollar stock added to the one hundred and thirty four thousand dollars of the Norfolk & Western Railroad Company would make one hundred and sixty four thousand dollars of paid up stock.

Then Scott, Jewett and McFadden contend that the amount divisible among stockholders must be divided on a basis treating one hundred and sixty-four thousand dollars as the amount of paid-up stock of the Central Improvement Company, while the Norfolk & Western Railroad Company contend that it must be divided on a basis treating one hundred and thirty eight thousand dollars as the proper amount of paid-up stock. This contention of the Norfolk & Western Railroad Company is sought to be supported upon the theory that the sum of one hundred and thirty eight thousand dollars, as the amount of paid-up stock, is unalterably fixed as a matter of *res judicata* by the former decision of this Court, and constitutes an estoppel against Scott's, Jewett's and McFadden's contending for any other sum. Let us see as to this contention. The object of the suit of *Fidelity Insurance, Trust & Safe-Deposit Co. v. Shenandoah Val. R. Co.* was only to enforce a mortgage given by the latter to the former company. We may dismiss that suit from consideration here. The object of the suit of *Crumlish's Adm'r v. Shenandoah Val. R. Co.* was to assert a debt against the Shenandoah Valley Railroad Company in favor of the Central Improvement Company. In ascertaining that debt, as above stated, the sum of one hundred and thirty-eight thousand dollars was held by this Court as the amount of the paid-up stock of the Central Improvement Company; and on the basis of that sum, a certain

amount was decreed against the Shenandoah Valley Railroad Company for its failure to deliver its income bonds to the Central Improvement Company. That this decision is *res judicata* and an estoppel upon the two corporations, the Shenandoah Valley Railroad Company and the Central Improvement Company, and stockholders of the latter company, for certain purposes, admits of no question. The two corporations were parties, and of course they are bound; and as the Central Improvement Company was a party, and Crumlish was a stockholder of that company, suing for himself and all other stockholders, not only Crumlish, but all other stockholders, are concluded for certain purposes. Then what are those purposes? What the limit of this estoppel?

I do not question the case cited, *Vanderwerken v. Glenn*, 85 Va. 9 (6 S. E. Rep. 806) holding that "in a suit wherein a corporation is a party the decree binds the stockholders, though they be not personally parties," nor the case of *Hawkins v. Glen*, 131 U. S. 319 (9 Sup. Ct. 739) holding that in the absence of fraud, stockholders are bound by a decree against the corporation in respect to corporate matters, and such decree is not open to collateral attack, when those cases are properly applied. I do not doubt that the sum fixed by said decision as the liability of the Shenandoah Valley Railroad Company to the Central Improvement Company and the elements entering into the process of reaching that sum, including one hundred and thirty eight thousand dollars, considered as the amount of paid-up stock, are forever binding on companies and stockholders. I do not question the proposition that neither the Central Improvement Company nor any of its stockholders can now say that the amount of indebtedness fixed by that decision in favor of the Central Improvement Company was not correctly fixed, or that one hundred and thirty eight thousand dollars paid-up stock, taken as a measure or basis in ascertaining that indebtedness, was not the correct amount for that purpose. The stockholders of the one company can for no purpose say the debt decreed against it is too large; the stockholders of the other can for no purpose say that the debt decreed in its favor is too small, because of untrue data or elements in its ascertainment. The

one hundred and thirty eight thousand dollars treated as paid-up stock then appeared right; but, under evidence since taken, it appears to have been larger. Though wrong, yet nobody can now question it, so far as the amount recovered is concerned. But now that the money stands for distribution among stockholders, the estoppel ceases. It is now a fund in the corporate treasury, first for payment of debts, then for distribution among stockholders according to their holdings. It is simply assets distributable equally among them.

Shall the loss arising from the fact that the evidence then present showed only one hundred and thirty eight thousand dollars paid up be borne by only some of the stockholders? Shall not this loss be shared by all stockholders in common like any other loss? The former decree of this Court, while it fixed irrevocably a certain sum as the liability of the Shenandoah Valley Railroad Company to the Central Improvement Company, and bound companies and their stockholders to that sum, did not fix the rights of stockholders as among themselves. The adjudication of the indebtedness of one company to the other is one thing; the adjudication among stockholders of their respective rights as to each other is quite a different thing. The use of one hundred and thirty eight thousand dollars paid-up stock as a factor in the process of the adjudication of the indebtedness of the one company to the other is one use, but its use in the adjudication of the rights of stockholders among themselves is quite a different one. For the one purpose, its use as a factor in fixing that indebtedness, it stands immovable, since it did enter into the adjudication of a specific sum of indebtedness; but for the other purpose, as a factor in settling the rights of stockholders among themselves, it not only is not immovable, but it is not a factor, since it was not used in that matter, as that matter was not passed on by this Court. That matter has never been passed on by this Court. It simply passed on the indebtedness between the two companies, but not on the rights of stockholders among themselves. That was not the point passed upon by the former decision. To make an adjudication an estoppel, it must appear that the same precise

question or matter was adjudicated in the former adjudication or was necessarily involved in the adjudication. *Western M. & M. Co. v. Virginia Cannel Coal Co.*, 10 W. Va. 250. The prior decision is conclusive, not only as to the matter actually determined, but also any other matter which the parties might have litigated, and had decided as incident to, or essentially connected with, the matter actually determined, coming within the legitimate purview of the action. *Sayre's Adm'r v. Harpold*, 33 W. Va., 553 (11 S. E. Rep. 16); *Rogers v. Rogers*, 37 W. Va. 407 (16 S. E. Rep. 633). Now the rights of the stockholders among themselves was surely not the subject-matter of the former decision of this Court, but the liability of one company to the other was that main subject-matter; nor were the rights of the stockholders among themselves necessarily involved in the settlement of the indebtedness between the companies; nor were the respective rights among themselves incident to or essentially connected with the adjudication of the indebtedness of the one company to the other. Their rights had nothing to do with that indebtedness, but were irrelevant. What had the Shenandoah Valley Railroad Company, as debtor to the Central Improvement Company, to do with the rights of the stockholders of the Central Improvement Company? The bill of Crumlish had three main objects in view for relief: *First*. The recovery of a debt in favor of the Central Improvement Company against the Shenandoah Valley Railroad Company; *second*, the ascertainment and payment of debts of the Central Improvement Company; *third*, the division of its assets among stockholders. Here were three separate and distinct purposes. The first object—the recovery of the debt against the debtor company, the only property of the other company—must be accomplished before the debts could be paid, and the balance distributed among the stockholders. A decree upon the single subject of the indebtedness of one company to the other was entered in the Circuit Court, leaving the other matters untouched, and that decree was brought here for review, and this Court passed upon that matter, leaving other matters untouched. How can this decree in any wise preclude action upon the matter of the distribution among

stockholders? It is every day's practice, when a bill calls for several different reliefs, to decree upon one, leaving the other intact; and, unless the things pertaining to one be necessarily involved in or essentially incident to the adjudication, it does not affect the relief to be afterwards given on other matters. For purposes of estoppel under the doctrine of *res judicata*, there must be identity of causes of action in the two controversies. 1 Greenl. Ev. § 528; Bigelow Estop. 75. There being three several matters contemplated as subjects of relief by the suit, we may say, for the present purpose, that there were three suits. The former decision was upon a trial of the first—indebtedness between the companies, arising from transactions between them. This controversy is upon another cause of action, arising from another transaction—that of subscription of stock, giving stockholders a cause of action against their corporation; and out of it arose controversy between stockholders. On the trial of the former the subject of the latter—the subscription of stock and amount paid therefor—came in only as evidence or collaterally, and was only incidentally cognizable. This will not make it an estoppel against the truth, so as to prevent the stockholder from showing that the amount of paid stock was greater than one hundred and thirty-eight thousand dollars. 1 Greenl. Ev. § 528; *Coville v. Gilman*, 13 W. Va. 314, 329, 332, 333; *Henry v. Davis*, *Id.* 230, pt. 4; *Ford v. Ford*, 68 Ala. 141; 2 Black. Judgm. §§ 611, 612, 622. Facts in a controversy on a trial, but not necessarily involved in the issue, though ever so important in its determination, are not settled by a judgment, but are open to controversy in any other suit between the same parties. *Beckwith v. Thompson*, 18 W. Va. 103. Not until the case went back from this Court did the Circuit Court take any action upon the matter of ascertaining and paying debts of the company, and settling the rights of stockholders, which it did by the reference to a commissioner to audit debts, and ascertain who were stockholders entitled to participate in the fund, and the amounts to which they were entitled. And the contention is that this one hundred and thirty-eight thousand dollars must be taken as the basis of the total sum charged to the

Shenandoah Valley Railroad Company for second mortgage bonds and income bonds, though it was a factor only in fixing the charge for income bonds, and had nothing whatever to do in fixing the charge for second mortgage bonds. I have devoted so much space to this subject of *res judicata*, because it was so elaborately discussed and strongly relied upon in the able briefs of counsel and their oral argument.

Another ground for the insistence that one hundred and thirty eight thousand dollars must be taken as the full amount of paid-up stock is that the commissioner, after reporting that the Norfolk & Western Railroad Company owned one hundred and twenty eight thousand dollars stock of the Central Improvement Company, remarked, apparently to show why he had not reported more stock, that it appeared from the records of the two suits that stock has been issued aggregating one hundred and thirty eight thousand dollars, but that he had not discovered to whom the excess belonged, and this report was confirmed without exception as to that point. In the first place, I doubt whether this can be called an actual finding as a fact that only one hundred and thirty eight thousand dollars stock had been paid up; and moreover, the commissioner says: "There appears to have been stock issued and aggregating par value of one hundred and thirty eight thousand dollars." What is meant by "stock issued?" Does it mean certificates issued? There could be stock without certificates. The order of confirmation reserved right, if Scott's and Jewett's representatives should show themselves to be stockholders, to except to the allowance by the report of fees and commissions, but confirmed it in other respects. It is plausibly argued that as yet the claimants had no standing in court, because they had yet shown no right to stock. The fair construction of the order is, as I think it is, that as the fixing one hundred and thirty eight thousand dollars concerned them as stockholders, the right to except to that is to be regarded as reserved. But perhaps this is immaterial as the decree of May 30, 1891, unequivocally confirmed that feature of the report. But it is an adequate answer to this contention that not till after said report was confirmed did the West Virginia administrators

of Scott and Jewett appear in the cause by petitions, setting up the claims of their decedents to stock, and ask that all prior decrees be reheard and reversed. Upon these petitions such order of confirmation of said report would be reheard and reversed. The prior proceedings, though the foreign representatives were before the court, did not conclude the administrators appointed in this state. By their petitions they excepted to said reports and former decrees. The report found the stock paid up one hundred and thirty eight thousand dollars on the evidence of the record alone, as it says, on the theory that this Court had unalterably fixed that sum, and that it was binding upon the stockholders *inter sese*, which we have seen is not the case. The commissioner, though he afterwards found that other stock had been paid for, felt himself bound, in making subsequent reports, by the former confirmed report. No petition to rehear was filed until one was filed in December, 1891, by Davis, administrator, and McFadden. Upon them the Court should have reviewed and corrected said decree, confirming said report. No matter what we call the petitions, full as they are, of matter showing title to cause of action, and for relief, assigning errors in former orders, and asking review, be the name what it may, petition by stranger just coming in, petition for rehearing, or bill of review, containing matter sufficient, it will be given effect according to its matter, regardless of name. *Sturm v. Fleming*, 22 W. Va. 404; *Martin v. Smith*, 25 W. Va. 579. I regard them as petitions of strangers intervening asking relief in the cause, and, as incident, the rehearing of former orders, and to be treated as to those orders as a petition for rehearing, and they ought to be treated certainly as liberally as petitions for rehearing as was the pleading called bill of review in *Martin v. Smith*, *supra*, filed by a non-resident. If we were to call it a bill of review, it would call for reversal of those orders for error of law appearing on the face of the record, not looking into evidence, but only to the face of the report; and so if we call it a petition for rehearing, and then we could look into the evidence; and so if we call it an original petition by a stranger intervening for the first time. For myself, I do not regard those orders, not carried

into actual decree at the time the petitions were filed as final, but only interlocutory, and reviewable on the hearing for the error on the face of the record, even did these petitions not ask rehearing, but only relief inconsistent with such orders. *Hyman v. Smith*, 10 W. Va. 298; opinion in *Fowler v. Lewis' Adm'r*, 36 W. Va. 129 (14 S. E. Rep. 447). This appeal brings those orders up. *Lloyd v. Kyle*, 26 W. Va. 534.

Another reason suggested for adhering to the sum of one hundred and thirty eight thousand dollars as the basis of distribution is that the commissioner's report of October 23, 1891, fixes the distribution; and that his finding, resting on that basis, is upon a question of fact; and that the law being that when a commissioner and the court have concurred in deciding a pure question of fact, this Court will give the finding great weight, unless it plainly appears to be wrong. *Fry v. Feamster*, 36 W. Va. 454 (15 S. E. Rep. 253). By the report above mentioned, the commissioner took said one hundred and thirty eight thousand dollars as the amount of paid up stock, and after deducting debts, commissions, etc., he allowed the Norfolk & Western Railroad Company, as owner of stock of the Central Improvement Company, a share in the fund for distribution among stockholders based on an ownership of one hundred and twenty eight thousand and fifty dollars of stock, its share being fifty seven thousand and eight dollars and eighty six cents, and left only a balance of the distributable fund of four thousand four hundred and twenty nine dollars and seventeen cents for other shareholders; and by decree of May 30, 1891, the court again referred the case to him to report who was entitled to said balance of our thousand four hundred and twenty-nine dollars and seventeen cents; and the commissioner reported, October 23, 1891, that Scott and Jewett were not entitled, and the court confirmed the report. We can not, it is argued by counsel, apply the principle announced in *Fry v. Feamster*, *supra*, to this report, for the reason that it is not a finding on a pure question of fact; or rather, the ultimate fact found is only an erroneous legal conclusion from other facts already found, which called in law for a different finding. The commissioner had found in a former report, and repeated it in

this, that Scott and Jewett had subscribed and paid for twenty five thousand dollars stock, and that alone called for a report in favor of their participation in the distribution. But as there was some evidence raising the question whether Scott and Jewett remained still stockholders, we may not be able to say that the finding against their right to share in the fund was purely an erroneous legal conclusion. But this I say, that it being found, and rightly found, that Scott and Jewett had subscribed and paid for stock, it was incumbent on those who denied their continued ownership to prove it, and that the evidence fell very far short of proving it, and the finding against them was contrary to the evidence.

A further plea for the exclusion of Scott and Jewett is their *laches*. This plea is wholly untenable, but in deference to counsel I refer to it. Wherein are Scott and Jewett chargeable with *laches*? One counsel says, only in failing to get certificate of entry on the books to show they were stockholders. Surely, this ought not to exclude them. As to entry in company's books, they had right to presume it would be done. It was not their fault, and the commissioner reports that substantially all the company's books and papers were lost. Certificates of stock are not indispensable as evidence of stock ownership. Scott had receipts for payment for stock, but they were mislaid. It is said they should have presented their stock, so that it would have been known that the paid-up stock was more than one hundred and thirty eight thousand dollars, so that the recovery against the Shenandoah Valley Railroad Company would have been larger. We do not know that they knew of Crumlish's suit to enforce the company's liability against the Shenandoah Valley Railroad Company. They were non-residents. There was no convention of stockholders; no order to ascertain them until August, 1890. Scott died in 1881; Jewett in 1875. Their representatives appointed in Pennsylvania appeared to claim their stock in February, 1891, and kept on claiming it. The personal representatives appointed in this state filed petitions claiming this stock in December, 1891. Papers to prove payment for stock, are lost. Neither Scott nor Jewett nor

their representatives were parties except constructively by Crumlish (a stockholder) and the company being parties. And if these stockholders knew of the suit, would they not have right to assume that their company would furnish the true amount of paid-up stock in order to recover the true amount of the debt? Are they more remiss in this than others? And why is it assumed that the stock of the petitioners was not a part of that one hundred and thirty eight thousand dollars? It was paid in cash, and part of the other stock was not. Was all the other stock present, and this alone absent? No other stockholder appeared but Crumlish until after the order for their convention. It would be inequitable to visit on them the burden of the failure to recover of the Shenandoah Valley Railroad Company as much as would have been recovered had their stock been known. Both the stockholders were dead; their papers lost. No other stockholder, except Crumlish, appeared, or did more than they. It is needless here to speak of the zealous efforts of the personal representatives of Scott and Jewett, commencing in February, 1891, to secure the fruits of this stock.

As to Scott's ownership of stock, a plea of *res judicata* is relied upon as specially applicable to his ownership. In 1874, a suit in equity was brought by Jefferson county as a stockholder against the Shenandoah Valley Railroad Company to annul three contracts between the Shenandoah Valley Railroad Company and the Central Improvement Company, because, among other reasons, when two of said contracts were made, Scott was president and director of Shenandoah Valley Railroad Company, and stockholder in the Central Improvement Company, and the bill charged that he was a stockholder, and the answer of the Central Improvement Company denied that he was a stockholder, and the court held those contracts void. The fact that they were held void tends to sustain the claim that he was a stockholder. The fact that the decree finds that Walker and Bardwell were stockholders furnishes a mere implication that Scott was not. The denial in the Central Improvement Company's answer that Scott was a stockholder can not preclude that stockholder's showing himself to be a stockholder. It

can not be possible that an answer of a corporation denying that one is a stockholder in a suit to which he is not a party, where the point comes up only incidentally as evidence, and not involving the adjudication of stockholders' rights, can conclude him against showing in another suit, having for its object the ascertainment of the stockholders and the settlement of their respective holdings, that he is a stockholder. If even Scott has been a party, the answer of a codefendant would not be evidence against him. Let us even suppose that one hundred and thirty eight thousand dollars must be taken as the unalterable amount of stock paid in, where even then the equity of according to the Norfolk & Western Railroad Company its full ratable quota for the one hundred and thirty four thousand dollars owned by it, and denying any part to Scott's and Jewett's twenty five thousand dollars, and allowing McFadden less than his ratable quota, even on the basis that he owned only four thousand dollars stock, as found by the commissioner? The fund was for distribution among stockholders. The fact that it was smaller, by reason of its not appearing by evidence when the case was before in this Court that there was more stock than one hundred and thirty eight thousand dollars, than it would have been had the further evidence been present, can not prejudice one stockholder more than another, ratably. It is a loss common to all. We may say that while the decree of March, 1891, confirming the report finding one hundred and thirty eight thousand dollars as the amount of paid-up stock, as long as it stood, would guide the commissioner, yet it ought not to have controlled the court in its final decree making distribution. The fund was for all stockholders. Why, in equity, should they not have shared by a common percentage?

My conclusion is that Scott's estate is to be treated as a stockholder in the Central Improvement Company in the amount of twenty thousand dollars, Jewett's estate in the amount of five thousand dollars, McFadden's in the amount of five thousand dollars and the Norfolk and Western Railroad Company in the amount of one hundred and thirty four thousand dollars, and they are to share in the fund for dis-

tribution among stockholders ratably by a percentage common to all of them.

Another important question is, shall the special receiver have any compensation for services, and if so, what? The commissioner credited him with sixteen thousand four hundred and sixteen dollars and seven cents, apparently intended to be two *per centum* of the gross fund realized from the recovery by the Central Improvement Company against the Shenandoah Valley Railroad Company. The appellants protest against this charge on the fund, as it lessens their portion. They say he was no receiver, because the decrees appointing him were reversed. By decree in the Crumlish suit (November 29, 1887) a special receiver was appointed in the cause, and authorized to file his petition in the cause of *Fidelity Insurance, Trust & Safe Deposit Co. v. Shenandoah Valley R. Co.*, brought to enforce a mortgage of the latter company, and by such petition to seek the recovery of the demand of the Central Improvement Company against the Shenandoah Valley Railroad Company, and to take such steps to that end as he might deem expedient, and to bring any money recovered into the Crumlish suit for distribution among those entitled thereto. The receiver gave bond under this appointment. In February, 1888, Crumlish's administrator and the receiver filed such petition in the *Fidelity, etc., Co.* suit, making the Central Improvement Company a party, to assert the demand aforesaid. Afterwards the decree appointing the receiver was wholly reversed. Afterwards by decree of December 3, 1889, the Central Improvement Company recovered of the Shenandoah Valley Railroad Company one hundred and twenty seven thousand dollars, and a special receiver was appointed to collect it. He never gave the bond required by this decree. Afterwards that decree was wholly reversed by this Court. It is plain that a reversal without reservation is a reversal *in toto* and ends all powers as to future action growing out of the decree or judgment. *Flemings v. Riddick*, 5 Gratt. 272; 2 Freem. Judgm. § 481. After the first reversal, the Circuit Court adjudicated that the receiver was no longer receiver, as it reappointed him; but he gave no bond, and it is held that until he gave bond he is no receiver

and has no title. Code, c. 133, s. 28; *Donahue v. Fackler*, 21 W. Va. 124; High, Rec. § 121; 20 Am. & Eng. Enc. Law 162. I think he was lawful receiver from his first appointment up to February 25, 1889, when the first reversal occurred; but I can not see how he was afterwards. There seems to be in the meager authorities on this particular point a difference, as to a right to charge the receiver's compensation on the whole fund, between cases where the appointment was regularly made and where it was not. In cases where it is irregularly made, it seems not chargeable on the fund, as the party in interest may object. I would think with Judge Beck in *Radford v. Folsom*, 55 Iowa 286 (7 N. W. Rep. 604) that if jurisdiction existed, its erroneous exercise (in the appointment) would not affect the right of the receiver (as to compensation) as long as the order of the court stands unreversed. But as the appointment is void, or becomes vacated and inoperative by reversal, how can it bind a party? Can he not avail himself of the nullity of the appointment? Perhaps that was among the reasons for which he sought reversal. In *People v. Jones*, 33 Mich. 303, it was held that as the appointment was void for want of jurisdiction, the receiver should have no compensation. In *Verplank v. Insurance Co.*, 2 Paige 438, the appointment was reversed, and the receiver ordered to give up property and without compensation. In *French v. Gifford*, 31 Iowa 428, this distinction is clearly drawn by the holding that the rule that the compensation of a receiver to take charge of the assets and wind up the affairs of an insolvent corporation should be paid out of the fund in his hands generally applies to cases where he closes up his business, and settles his accounts, not to cases where the order appointing him is set aside as improperly made. It was later recognized in *Radford v. Folsom*, 55 Iowa 276 (7 N. W. Rep. 604). See Beach Rec. § 773; Gluck & B. Rec. § 105. These cases tend strongly to show that we can not regard this receivership as continuing after reversal of the decree creating it. Its foundation failed.

Should a special receiver be given compensation by way of commission on receipts or otherwise? There is no fixed rule. Often the commissions would be grossly excessive

or often too little. In many instances there is an inclination to allow what are allowed administrators and trustees for similar services. The true rule is that he is an officer of the court, and the court may fix his compensation, giving him what is fair and reasonable under the circumstances of the particular case, rather than by any invariable rule or analogy. *Abbott v. Packet Co.*, 4 Md. Ch. 310; *Magee v. Cowperthwaite*, 10 Ala. 966; *Gardiner v. Tyler*, 42 N. Y. 505; Gluck & B. Rec. § 103; High Rec. § 781. Where the fund is large, it is usual to allow a salary or lump sum. 1 Fost. Fed. Prac. § 258; *Cowdrey v. Railroad Co.*, 1 Woods 346, Fed. Cas. No. 3,293; *Farmers' Loan & Trust Co. v. Central Railroad of Iowa*, 8 Fed. 60; *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 32 Fed. 187. In *French v. Gifford*, *supra*, Miller, J., afterwards Mr. Justice Miller, said: "While we concede that the receiver should receive a compensation corresponding to the high degree of business capacity, integrity, and responsibility required in cases of this character, and which was secured in the person of the receiver in this case, yet we feel it our duty to allow only such sum as will be such reasonable compensation." In *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 32 Fed. 188, Brewer, J. said what is obviously law, that the allowance to a receiver is a judicial act, and while it is left to the discretion of the court, it is discretionary only in the sense that there are no fixed rules to determine the allowance, and it is not discretionary in the sense that courts may allow anything more than a fair and reasonable compensation; that the court desired to see officers of the court well paid, so that men of character and ability may be willing to accept the burden and responsibilities of these trusts, but at the same time courts must not forget that the property to be charged with such allowances is not the property of the judges, and that there are thousands all over the land who are owners, whose property by the strong hand of the law has been taken out of their custody and who look to the courts to see that no unjust or excessive burden is cast upon them. Courts may not exercise the generosity of owners, but are closely limited to the justice of judges. In this case there were no assets to care for or pursue but the debt on the

Shenandoah Valley Railroad Company, and that came by decree. In fact, very little, if any, actual money came to the hands of the receiver. The Norfolk & Western Railroad Company purchased the railroad of the debtor company, and, owning a large share of the stock of the Central Improvement Company, was simply credited with it on purchase money. The receiver says in a brief filed by himself it paid the attorney's fees and so-called "by-bid" below mentioned, aggregating three hundred and sixty thousand dollars, and that that part of the fund stood for its use, and that the same company owned three hundred and sixty thousand dollars out of three hundred and eighty two thousand dollars of debts audited against the Central Improvement Company; and yet the receiver is given a commission on those sums. It is not made to appear by the record what, if any, actual money went into his hands to be cared for and guarded, which constitutes a large element in the consideration for which receivers are allowed compensation. He made no report of it. He appeared in court February 28, 1893, and admitted that there was then in his hands sixty one thousand nine hundred and forty dollars and three cents distributable among stockholders. That sum, with commissions, debts, and counsel fee, and by-bid, made up the sum recovered against the Shenandoah Valley Railroad Company; so that, except said sum of sixty-one thousand nine hundred and forty dollars and three cents and commission, no other actual money came to his hands; and of this the Norfolk & Western Railroad Company owned the greater part as stockholder. Indeed, I see no decree directing the money to be paid him save that of November, 1887, which was reversed, as above stated. Thus, there is no ground for basing compensation on commission on the said gross sum, as was done in the report of the commissioner. We must adopt a specific sum. We find that he was a lawful receiver until February 25, 1889. Prior to that time he took some steps of importance in the cause. We can not, as a court of equity, deny him some compensation. It is urged he resisted with the means in his hands the participation of appellants as stockholders. He

did except to the report of the commissioner finding them to have paid for stock; but this was late, after all service for which he charges or can be allowed had ended. We do not see that he used the fund for that purpose. He appears to have been through years diligent, zealous, laborious, and efficient in the prosecution of the rights of the Central Improvement Company against the Shenandoah Valley Railroad Company under the most adverse and discouraging circumstances rendering its cause at various periods of the litigation to all reasonable appearances a forlorn hope; and though the decrees were reversed, the court still calls him and treats him as receiver. McFadden, Scott, and Jewett shared the benefit of the services. I have fixed upon twelve thousand dollars as the total compensation of the receiver, of which Scott's and Jewett's estate and McFadden are to pay their proportionate part.

* Another important matter is the allowance by the commissioner out of the fund of two hundred thousand dollars for fees of counsel employed by the receiver in the prosecution of the demand of the Central Improvement Company. While the decree of November 27, 1887, was unreversed, the special receiver employed counsel to prosecute the claim of the Central Improvement Company against the Shenandoah Valley Railroad Company; and they began proceedings and continued them until they gained their cause in the recovery of the large debt above spoken of. It is beyond any question fair and truthful to say, in a few words, that the services of the counsel were unremitting through the vicissitudes of victory and defeat in the courts, original and appellate, for twelve years, and able, laborious, zealous and faithful, yielding to none of many discouragements often presenting themselves. Orders appointing receivers should authorize the employment of counsel, if such is the purpose, as charges are often made for them after service rendered when it is difficult to deny them. Courts are indisposed to allow receivers for counsel when their employment has not been before authorized. High, Rec. § 805. This decree did not expressly authorize the receiver to employ counsel; but it empowered him to prosecute a suit for the recovery of the

claim, and "to take such other proceedings to that end as he may deem expedient;" and as counsel were absolutely necessary, we may say their employment was contemplated by the decree, and at any rate, that it was an act of sound discretion, which under the imperious nature and circumstances of the case, a court ought to approve. No case ever required the service of counsel more. True, the decree appointing the receiver fell by reversal, but we hardly think that would vacate the retainer of counsel; and at any rate, these counsel went on term after term in open advocacy of the cause in the court which had appointed the receiver, and it thus recognized their continued relation to the cause. These services redounded to the benefit of each and every stockholder, and all must bear the burden of fair and reasonable compensation. If this Court sees, as it does, that such services were essential, and that without them the debt would have been—likely would have been—lost, and the stockholders themselves had not their own counsel, it would seem just to charge, and unjust not to charge, all of them with such services, as they share in the fruits of these services. That a court of equity may allow receivers counsel fees in proper cases is beyond question. Their amount is within the sound discretion of the court. *Stuart v. Boulware*, 133 U. S. 78, 10 Sup. Ct. 242.

But the action of a receiver in employing his relatives or friends as counsel on his own motion is open to great abuse, except when specially directed in open court, where the interests involved may be heard, and should be watched with great jealousy by courts. Courts must realize that they are applying moneys in their grasp belonging to persons who, as the power is largely discretionary, are powerless to resist, absolutely helpless and remediless in courts of the last resort. Mr. Justice Brewer said in *Central Trust Co. v. Wabash St. L. & P. Ry. Co.*, 32 Fed. 187: "There has been no little implied criticism in the language of appellate courts of the magnitude of the allowances made in foreclosure cases to counsel, receivers, and others. We are admonished by utterances of the Supreme Court to be cautious in this respect." He said: "Our duties are as sacred, our responsibilities more solemn,

than those of any other parties connected with this foreclosure, for our action is almost certainly final." I say our duties are more sacred and solemn than those of any others connected with this case, not only because our action is final, but for other and higher reasons. The highest court in the land, while making an allowance, deemed it necessary to adopt a point of broad scope in the syllabus of its decision, to emphasize prudence in this matter, in the strong language following: "The practice of allowing to trustees, complainants and receivers, and their counsel large and extravagant counsel fees and commissions, payable out of the trust fund under the control of the court, commented on and disapproved." *Trustees v. Greenough*, 105 U. S. 527. I venture to repeat what I wrote in the case of *Fowler v. Lewis Adm'r*, 36 W. Va. 154 (14 S. E. Rep. 447): "I certainly am disposed to be fairly liberal to my own profession, but not at the sacrifice of the interests of the many. I do not think it would confer a benefit upon that honorable profession, comprising the brightest men and leaders in society, trusted by the public with their most vital, sacred and important interests private and public; but it would in the end bring the whole bar into disrepute and unpopularity, by the improper and cormorant use which would often be made of the rule by the least meritorious of its members. An abuse we know it has become where it prevails. The United States Supreme Court in *Trustees v. Greenough*, 105 U. S. 527, condemns the practice of allowing large fees out of trust funds now prevalent; and Mr. Justice Miller, in the same case, dissented, and called it a 'gross judicial abuse of the present day; namely, the absorption of the property or a fund which comes into the control of a court by making allowances for attorney's fees and other expenses.'"

In view of the increasing number of instances in this state in these days of its progress and development, in which courts of equity are called upon to administer the assets of corporations and others, I have availed myself of this occasion to advert to principles which will be of frequent use in the courts. It might be thought that as the receiver has not shown that he has paid these counsel fees, but that the Nor-

folk & Western Railroad Company has, we could not allow anything on this score, since it is only allowed on the theory that it is an expense of the receivership, and the fee is allowed to the receiver, not to counsel. *Stuart v. Boulware*, 133 U. S. 78 (10 Sup. Ct. 242). But the receiver employed the counsel and other stockholders have incurred the expense in saving assets for the common benefit, and others ought to help bear the burden. *Trustees v. Greenough*, 105 U. S. 527.

Therefore, on this branch of the case, it only remains to say what shall be allowed for such counsel fees. Some of these counsel had, before they engaged to the receiver, engaged with certain stockholders, holding a large amount of stock to recover it, having fees in some case for one fourth, in some one half, of recovery, contingent wholly on recovery, which, under the dark clouds then lowering over their stock, were not unreasonable. It may be that these stockholders assented to the sum of two hundred thousand dollars. If so, that is their own act, but, of course, does not bind Scott's and Jewett's estates and McFadden, who stubbornly protest against any allowance to their prejudice; and we can not fix any sum approximating that sum, and thereby charge them on that basis by charging it on the fund. We do not intend to affect in any way any arrangement which may have been made between receiver and counsel and other stockholders; but as to McFadden and Scott's and Jewett's estates, we must treat the fund, so far as they are concerned, not being parties to any private arrangement, as money in court, and deal with it as a court of equity. We find that in 1882, long before the receiver was appointed and authorized to go into the Fidelity Company's suit to recover the debt due from the Shenandoah Valley Railroad Company, one of the firms of attorneys employed by the receiver (the receiver being a member of it) had filed a bill in the suit of Crumlish's administrator, as a stockholder in the Central Improvement Company, to assert that debt against the Shenandoah Valley Railroad Company, and success in that suit would have procured the fund for all. It does not appear what was the engagement between said administrator and his counsel. This is mentioned as a matter touching on the *quantum* of counsel fees.

Again, we do not see that so many as five different attorneys were essential. We fix eight thousand dollars as the sum to be paid by Scott's and Jewett's estates and McFadden proportionately as between themselves, for services redounding to their benefit for all fees of counsel. The receiver agreed on no fixed compensation with the attorneys, but it was to be left to the court. The amount, under any circumstance, would be within the discretion of the court. *Stuart v. Boulware*, 133 U. S. 78 (10 Sup. Ct. 242).

One of the attorneys for appellants makes the point that a certain contract bars any claim for counsel fees or receivers' commissions. A written agreement was made between certain attorneys for certain unnamed stockholders of the Central Improvement Company and the Norfolk & Western Railroad Company, whereby the Norfolk & Western Railroad Company purchased the holdings of said stockholders at the price of five hundred thousand dollars; and it contains a fourth section, providing that the attorneys and receiver in these suits should relinquish all claims for fees or commissions except such as were paid out of said five hundred thousand dollars, the receiver being aware of this contract, and signing an *addendum* relative to another clause. While I think that agreement would forbid attorneys and receivers from claiming any compensation from any stockholders other than those owning the stock sold by said agreement, yet, the agreement not including other stockholders, it seems to me it does not forbid the stockholders referred to in it from asserting an equity outside of it, of calling upon other stockholders to bear such part of the burden as a court of equity would deem fair. I regard this claim to charge other stockholders with counsel fees as one made by some stockholders to compel others to share their burden. This agreement, or any other for counsel fees, stands out to itself as made by parties competent to contract, and not binding on those standing out of such agreement.

The last matter for consideration is the allowance by the confirmed commissioner's report of a sum of one hundred and sixty thousand dollars out of the fund. I state the facts pertinent to this point. The Central Improvement Company ob-

tained a decree against the Shenandoah Valley Railroad Company for the large sum so often above spoken of; but it was second as a lien to another of, say five million eight hundred thousand dollars, including costs. It is said in evidence tending to show it that the Norfolk & Western Railroad Company owned or was in touch with this prior lien, and had formed a plan to buy the Shenandoah Valley Railroad at the then approaching sale, under decree, at a sum only covering the prior lien, and shutting out the debt of the Central Improvement Company, and thus that debt was in imminent, actual danger of total loss to creditors and stockholders. In this emergency the bulk of the stockholders of the Central Improvement Company came together, and passed a resolution authorizing a committee by them appointed to take steps in their discretion to secure payment of said debt with power to place the debt as security for any money it might be necessary to borrow, or to use a portion of the debt to secure financial assistance in the purchase of the Shenandoah Valley Railroad, if a purchase should be necessary. Under this authority, after fruitless efforts in other quarters, the committee made arrangements with the Memphis & Charleston Construction Company, backed by four individuals, by which it was to bid for the road a sum sufficient to cover the debt of the Central Improvement Company, for which service the Memphis & Charleston Construction Company was to be paid two hundred thousand dollars. When the Norfolk & Western Railroad Company learned this, it agreed to and did bid a sum sufficient to cover the Central Improvement Company's debt. Afterwards the Memphis & Charleston Construction Company agreed to reduce the sum it was to get to one hundred and sixty thousand dollars, and it is this sum which was charged by said commissioner's report as a proper charge upon said fund. The receiver, as such, was not a party to this contract, but in evidence says it is a fair and proper charge, under the necessity of the case. He did not pay it as a receiver. It is the necessity of this expenditure to save the debt of the Central Improvement Company from absolute loss which is pleaded to charge it upon the funds. Such

loss might have come, but can we assert that necessity to have in fact existed? Can it be demonstrated to us, as a court, by mere opinion evidence, that such loss surely would have fallen? How can we say, with a safety or certainty warranting us in allowing such a charge, that the Shenandoah Valley Railroad, with a mileage of two hundred and fifty five miles, running from Roanoke City, Va., to Hagerstown, Md., through the length of the Shenandoah Valley, and its whole line through one of the very finest and most beautiful sections of the Republic, touching or crossing three great east and west trunk lines, and in easy and close reach of another, forming an artery of connection between the great cities of the North, Boston, New York and Philadelphia, and the South—how can we say that this road, on actual sale, open to free competitive bidding, would not have brought seven million dollars? If we should say so, it would be an arbitrary guess, in a legal point of view. Counsel proposes as a test that if the court would have authorized it in advance, it ought now to be allowed, and asks whether the expenditure would not have been authorized by a court in advance. I answer that it would not. The court would let the property take its chances in the usual course at the open auction. Would a court, where a farm was to be sold for creditors having liens in different orders, at the request of some of the junior lienors, without the consent of others, make an order to pay a large sum to procure a bid, and charge it ratably upon those not consenting, so as to lessen their shares? This charge is so large a drain on the fund, and so extraordinary and out of the usual line and course of the administration of assets of an insolvent corporation by a court of equity, that a court would not allow it. It is not a charge fairly and reasonably incident to such administration. Certain ones of the stockholders authorized the expenditure. They had clear right to do so, but it was a sacrifice which they deemed prudent for the promotion of their own interests—their individual act, to save their own property; and the mere fact that their act resulted as a consequence in saving others interested is no reason for a court to charge an expenditure of that character and amount upon those not joining in the

act, and protesting against their interests being burdened with it. They had a right to stand out and run the risk of loss, and let others make a sacrifice personal to themselves if they chose. I have not met with or been cited to a case allowing a charge parallel with or analogous to this charge. The receiver has not paid it, nor could he have done so, for he can pay only such outlays as fall in the ordinary course of the business intrusted to him, such as are contemplated in his appointment. *Cowdrey v. Railroad Co.*, 93 U. S. 352; *Cowdrey v. Railroad Co.*, 1 Woods 331; Fed. Cas. No. 3,293. In extraordinary cases, involving a large outlay of money, the receiver should apply to the court in advance for authority to make the outlay. *Id.* It can not be allowed on the ground that the receiver has paid it, but only on the ground that other stockholders incurred the expense; but that, as I have said, as to this expenditure, is one chargeable only to them.

Therefore, I think the decrees of the 20th day of February, 1893, and of the 28th day of February, 1893, should be wholly reversed; and the decree of May 30, 1891, should be reversed; except that provision directing payment to U. L. Boyce of a certain debt therein specified in favor of John Lee; and so much of the decree of March 2, 1891, as may be construed to the prejudice of the rights of Charles McFadden and the estates of said Scott and Jewett should be reversed, and the cause remanded, that a decree may be made according to the principles herein indicated.

CHARLESTON.

TURNER v. NORFOLK & W. R. Co.

Submitted January 15, 1895—Decided April 17, 1895.

1. RAILROAD COMPANIES' DECLARATION--NEGLIGENCE.

The allegation in the declaration that the defendant, "without ringing the bell or blowing the whistle, or giving any warning whatever," is a general allegation, under which the plaintiff may introduce any evidence tending to prove any negligence on the part of the defendant wherein it failed to give warning of an approaching train.

40	675
41	418
40	675
45	156

40	675
48	366

40	675
150	474
40	675
64	403
54	404
54	529

40	675
58	223
158	224

40	675
61	32

40	675
65	736

2. INSTRUCTIONS—REVERSAL.

If it plainly appears that the defendant could not have been injured by the modification of an instruction asked, even though the modification was unnecessary, the failure to give such instruction without such modification is not sufficient cause for the reversal of the judgment.

3. CONTRIBUTORY NEGLIGENCE—INFANT—JURY.

In determining whether a boy sixteen years of age was guilty of contributory negligence, the jury have the right to take into consideration his age, capacity, and experience, and although he may have been guilty of an act which in an adult would have amounted to an assumption of the risk of injury, and a waiver of the duty the master owes him, yet he can not be held to have assumed any such risk or waived any such duty, which one of his age, discretion and experience could not fully comprehend and appreciate.

4. CONTRIBUTORY NEGLIGENCE—INFANT—NEGLIGENCE OF VICE PRINCIPAL.

A minor has the right to rely upon the superior skill and knowledge of the foreman having authority over him, and if, in obedience to such foreman's directions, he runs into unknown dangers, against which it is the duty of the foreman to warn him, but which duty such foreman negligently fails to perform, he can not be held to be guilty of contributory negligence or to have assumed the risk of such dangers.

5. DAMAGES—JURY—VERDICT.

The action of the jury assessing damages in case of the death of a person by the wrongful act, neglect, or default of another is not reviewable, as no damages allowed by the jury within the limit fixed by the statute can be deemed excessive, their determination of this question being absolute and exclusive as to what damages are fair and just, unless the verdict evinces passion, prejudice, partiality, or corruption on the part of the jury.

6. EXEMPLARY DAMAGES—NEGLIGENCE.

In all cases of negligence the law governing the assessment of exemplary, punitive, or vindictive damages is the same whether death result or not.

CAMPBELL & HOLT for plaintiff in error.

- I.—*The engineer and fireman of the special engine were fellow servants of the decedent, a section hand upon the track.*—109 U. S. 478; 27 Md. 589; 58 Wis. 585; 9 Cush. (Mass.) 112; 88 N. Y. 481; 31 Minn. 553; 35 N. W. Rep. 582; 5 N. Y. 492.
- II.—*The plaintiff's decedent was guilty of contributory negligence.*—Cooley on Torts (2d Ed.) p. 812; 29 W. Va. 98; 33 W. Va. 548; 88 Mich. 334; 30 W. Va. 798.

- III.—*Turner, the party killed, was sixteen years of age, and having passed the age of fourteen, he was presumed to have had sufficient capacity and understanding to be sensible of danger, and of having had the power to avoid it, and this presumption should stand until it is overthrown by proof of the absence of such discretion and intelligence.*—88 Pa. St. 35; 39 N. Y. S. R. 520; 34 N. E. Rep. 186; 54 Am. & Eng. R. Cases 121 (Ky.); 78 Ill. 88; 33 N. Y. 644; 15 N. W. Rep. 115; 58 N. Y. 248.
- IV.—*The former opinion herein recognizes, permits and commends the doctrine of punitive damages contrary to the former adjudication of this Court upon the subject.*—31 W. Va. 242-355; 13 W. Va. 158; 25 W. Va. 139; 20 W. Va. 253.
- V.—*The right given a jury by section 6 of chapter 103 of the West Virginia Code to assess damages not to exceed ten thousand dollars, whenever the death of a person has been caused by a wrongful act, is not a right that may be exercised arbitrarily; but their exercise thereof is always subject to proper correction and control by the court under the established rules of law.*
- VI.—*In the case at bar the evidence failed to furnish any proper data upon which to base a verdict or judgment.*—45 Ill. 197; 43 Ill. 338; 18 Iowa 281; 47 N. J. L. 28; 26 Ill. 400; 84 Pa. St. 419.
- VII.—*The verdict was contrary to the evidence.*
- VIII.—*The plaintiff's declaration did not allege negligence in general terms, but stated the specific acts of omission and commission constituting the alleged negligence, and his instructions No. 4 and 5, being based on an omission of the defendant not included in the declaration were erroneous.*—15 W. Va. 628.
- IX.—*The plaintiff's intestate was guilty of contributory negligence.*
- X.—*The defendant's instructions were improperly refused.*—30 W. Va. 798.

MARCUM, PEYTON & MARCUM for defendant in error:

The verdict was supported by the evidence.—33 W. Va. 319.

The allegations of declaration are general.—15 W. Va. 628;

30 W. Va. 698; 32 W. Va. 372.

Objection to testimony must be made in trial court.—27 W. Va. 306.

The modification of instructions was proper.—30 W. Va. 798; 37 W. Va. 606.

The defendant in error is not guilty of contributory negligence.
—Wood Mas. & Serv., § 366.

Need not aver nor prove next of kin in West Virginia.—28 W. Va. 610; 32 W. Va. 370.

Nor in Virginia.—29 Gratt. 431; 29 Gratt. 570; 32 Gratt. 394; 36 Fed. Rep. 102. •

Nor in North Carolina.—94 N. C. 250.

Measure of damage in Missouri.—31 Mo. 574.

In Alabama.—58 Ala. 672; 59 Ala. 272.

In Maryland.—24 Md. 271.

In Nevada.—7 Sawyer 224.

In Illinois.—43 Ill. 338; 123 Ill. 641; 75 Ill. 468; 83 Ill. 204; 129 Ill. 344.

In New York.—47 N. Y. 317; 14 N. Y. 310; 38 N. Y. 445; 92 N. Y. 219; 48 Hunter 517; 1 N. Y. Sup. Ct. 257; 34 Hun. 80; 77 N. Y. 588; 15 Hunter 559.

The burden of proving contributory negligence on defendant.
—16 W. Va. 307.

The fault in a case like this must amount to rashness, or recklessness.—17 S. E. Rep. 645.

As to contributory negligence in minor servants.—76 Ill. 32; 1 Shear. & Red. on Neg., pp. 376, 378; 27 W. Va. 32.

DENT, JUDGE:

Nathaniel Turner, administrator of the personal estate of Pearly Turner, deceased, instituted suit in the Circuit Court of Wayne county on the 11th day of February, 1892, against the Norfolk & Western Railroad Company, for the sum of ten thousand dollars damages on account of the death of said Pearly Turner, and on the 8th day of October, 1892, recovered the judgment for the sum of four thousand five hundred dollars, being the amount of damages assessed by a jury.

The defendant, upon a writ of error to this Court insists upon the following errors: "*First.* The court erred in granting the plaintiffs instructions numbers 4 and 5. They were

each irrelevant and misleading, in that neither was predicated upon the specific act of negligence charged in the plaintiff's declaration. *Second.* If it were proper for the court to grant the plaintiff's instructions numbers 4 and 5, then it was error to refuse to grant your petitioner's instructions numbers 1 and 2, as by it prayed. *Third.* The court erred in not setting aside the verdict as contrary to the law and evidence. *Fourth.* The measure of damages in case of death is the value of a man's life to his estate. The record contains no evidence whatever of the deceased's earning capacity, and the verdict was in consequence, not only excessive, but absolutely without foundation, and should have been set aside."

The material facts in this case are as follows: On the — day of February, 1892, Pearly Turner, a boy sixteen years of age, of average intelligence, industrious, obedient and healthy, while in the employ of the defendant, under the direction and control of a foreman named Alley, met his death in a collision between an extra engine and a hand car, at a curve about five miles from Wayne Courthouse. The deceased was on the hand car with a crew of employes, all of whom, at the time of accident, were acting under the orders and immediate supervision of said foreman. The foreman went ahead of the hand car to the curve, and without going himself or sending some one else to ascertain whether an extra was coming, as the rules of the company required him to do, got on the hand car and started around the curve, and met the engine near the middle thereof. All escaped except the deceased, who was killed outright.

The evidence is conflicting as to whether the whistle of the engine was sounded or the bell was rung; the engineer and crew with him testifying that the whistle was sounded and the bell rung at a road crossing eight hundred or nine hundred feet from the curve, and that such sounding of the whistle was for the curve, as he, the engineer, was on the lookout for a gang of carpenters. None of the crew on the hand car heard either signal, and some other parties testify that they did not hear either whistle or bell, although in position to do so. The deceased had been in the employ of the company for about five months, had passed over the road frequently, and

had often flagged trains for the foreman. His father was dead, but his mother was living.

First. The instructions referred to in the first assignment of error are as follows, to wit: "No. 4. The jury are instructed that when a railroad company puts a foreman in charge of a gang of laborers, with power to discharge them, subject to the approval of the supervisor and makes it the duty of said foreman to see that these laborers perform their duty faithfully, such foreman must, in the performance of all his duties to those laborers under him, be regarded as the representative of the railroad company, and if, through his neglect of duty, one of these laborers in the performance of his duty, is injured without negligence upon his part, such laborer may recover of the railroad company the damages he has sustained, caused by the negligence of such foreman without the knowledge of such laborer. No. 5. The court instructs the jury that the plaintiff's intestate, Pearly Turner, had the right to assume that his foreman, E. Alley, would give all proper attention to his safety, and that he would not be carelessly and needlessly exposed to risks and damages not necessarily resulting from his occupation, and which might have been prevented or much diminished by ordinary care and precaution on the part of his master or his representative, in this case Foreman Alley." The objection to these instructions is an alleged variance between the declaration and the proof. The part of the declaration referred to is as follows: "While said plaintiff's intestate was engaged in propelling and operating the said hand car on defendant's track on said section, without any default or negligence on his part, and without any knowledge of the danger to which he was then and there exposed, the said defendant wrongfully, negligently and injuriously ran and caused to be run a certain steam locomotive engine around a sharp curve and through a deep cut, without ringing the bell or blowing a whistle, or giving any warning whatsoever, with great force and violence over, upon and against the said hand car, upon which said plaintiff's intestate was as aforesaid, whereby and by reason whereof the plaintiff's intestate was bruised, wounded and mangled, from which said

wounds, bruises and injuries afterwards, to wit, on the day and year aforesaid, he died." The defendant insists that the instructions were not proper, because the jury, under this declaration, could not find the defendant guilty of an act of negligence committed by Foreman Alley in not taking the required steps to ascertain and warn the deceased of the approaching train. This was a duty the defendant owed to the deceased and which it imposed upon his foreman, and certainly comes within the general allegation of the declaration, "without any warning whatsoever." Foreman Alley was the agent of the defendant as to giving this warning, and his failure to do so was the failure of the defendant. It was necessary for the jury under this declaration to have before them, and take into consideration any and all failures on the part of the defendant to warn deceased of the approaching train, and if the defendant had warned him through any of its agencies, it would have been sufficient, although all the others had been guilty of negligence in this respect; and the declaration is founded on the fact that the defendant failed in its duty, and if it had not been broad enough to cover the negligence of Foreman Alley, it would have been bad on demurrer or motion to exclude the evidence. The demurrer was overruled, and properly so, and no motion was made to exclude the evidence. The evidence which justifies the instructions was first introduced by the defendant on its theory of the case, to show contributory negligence on the part of deceased, and being in for its purposes, it could not have it excluded because it sustained the plaintiff's case. The instructions were, therefore, proper to meet the defendant's claim of contributory negligence, if for no other purpose. The defendant can not relieve itself in a case of this character, resulting from the negligence of its servants, by showing that others of the servants were equally or more negligent, and if they had not been so, the accident would not have happened, unless it shows that the deceased contributed to the latter's negligence. An attempt of this kind was made in this case, and was properly met by these instructions. Under this view of the questions presented, the authorities referred to by the defendant's counsel have

no application to this case, but only where there is a plain variance between the allegations and the evidence, which has been taken advantage of in the trial court and not here raised for the first time. On this subject, in addition to the authorities cited by plaintiff's counsel, see *Long v. Campbell*, 37 W. Va. 665 (17 S. E. Rep. 665).

Second. The instructions referred to in the second assignment of error are as follows, to wit: "No. 1. The court instructs the jury that if they believe from the evidence that E. Alley was a foreman of the defendant, in charge of a gang of laborers putting in cattle guards along defendant's line; that the plaintiff's intestate, Pearly Turner, was a member of such gang, and subject to the authority of said Alley; that on the morning of January 28, 1892, the said Turner, in company with his said foreman and the other laborers of the gang under him, got on a hand car on the defendant's railroad track willingly and without objection, and rode along on said hand car in the direction of Wayne, through cuts and around curves, without the foreman of the crew, or any member thereof by his direction, being ahead with flag or other signal to give the hand car and its occupants warning of danger by reason of approaching trains or otherwise, and the absence of such flagging was known to said Turner, and he still without objection remained on the hand car—then, under such circumstances, the said Pearly Turner accepted and assumed the risk of encountering or coming in contact with any extra train or wild engine that might be on the track, and which could be escaped by such flagging; and under such circumstances, if the jury find that the neglect of the foreman to flag was the proximate cause of the injury to Pearly Turner, they can not find for the plaintiff, but must return a verdict for the defendant. No. 2. If the jury find from the evidence in this case that the intestate, Pearly Turner, for two or three months prior to his death, had been in the service of the defendant, under Foreman Alley, working upon the defendant's railroad track putting in cattle guards, and to his knowledge the railroad company during that time had been daily running on said road divers extra trains, without previous notice, back and forth from one point to another

at irregular hours of the day, and that said Turner, without compulsion, got upon the hand car on the morning of January 28, 1892, knowing that his foreman, Alley, had no knowledge or opportunity of knowledge that extra No. 2 would be approaching that morning, and also knew that his said foreman had not flagged around the curve where the accident occurred, then the jury are instructed that the said Turner assumed the risk of a collision between his hand car and any extra which might meet them on said curve." And the plaintiff objected to the giving of said instructions, and each of them, and the court sustained said objection, and refused to give said instructions, or either of them, in the above form; to which opinion of the court in refusing to give said instructions and each of them, the said defendant again excepted. Thereupon the court modified each of said instructions by adding to No. 1 the following language: "Provided the jury further believe from the evidence that Pearly Turner had knowledge of the duties of said foreman Alley to do such flagging, or cause it to be done, and if the jury believe further from the evidence that Pearly Turner had knowledge at the time of the accident that said Alley had not so done his duty." And by adding to No. 2 the following language: "Provided the jury further believe from the evidence that Pearly Turner had knowledge that it was the duty of said foreman to do or have done such flagging." And the court then gave each of said instructions as so modified.

The modifications made by the trial court to these instructions come clearly within the rule as decided by this Court in the case of *Gregory's Adm'r v. Railroad Co.*, 37 W. Va. 606 (16 S. E. Rep. 819). The mere fact that a part of the modification is a repetition of what is already contained in the instruction would not vitiate it to the prejudice of the defendant. These instructions were based on the contributory negligence of the deceased, who could not be considered as waiving the discharge of a duty which the foreman owed him as the agent of the defendant, unless he had knowledge of the duty. The court did not err in so modifying the instruction, but it did err in giving the instruction as modified, but not to the prejudice of the defendant.

The first instruction contains this language: "Through cuts and around curves, without the foreman of the crew, or any member thereof by his direction, being ahead with flag or other signal to give the hand car and its occupants warning of danger." There is no evidence in this case that justifies this part of the instruction, as it does not appear that any other cuts and curves were passed that morning where the foreman neglected his duty to flag but the one where the collision occurred, and the jury can not infer from one proven act of negligence that other similar ones occurred. Both instructions are vicious for another reason. They fail to take into consideration the age, capacity, and experience of the deceased. 3 Wood R. R. (2d Ed.) § 380, p. 1754, lays down the law as to the employment of minors as follows: "The mere fact that a servant is a minor does not of itself render the master under any greater obligation to him than to older employees. When he enters the service he assumes all the risks incident to it, and no exception to the general rule in this regard is made in his favor." And in Wood, Mast. & Serv. p. 714, § 349: "Where the servant has equal knowledge with the master of the danger incident to the work, he takes the risk on himself if he goes on with it, but this only applies where the servant is of sufficient discretion to appreciate the dangers incident to the work. Where there are latent defects or hazards incident to an occupation, of which the master knows or ought to know, it is his duty to warn the servant of them fully, and, failing to do so, he is liable to him for any injury that he may sustain in consequence of such neglect; and this rule applies even where the danger or hazard is patent, if, through youth, inexperience or other cause, the servant is incompetent to fully understand and appreciate the nature and extent of the hazard." In the case of *Railroad Co. v. Fort*, 17 Wall. 558, a suit for damages sustained by a boy sixteen years of age, Justice Davis, rendering the decision of the court, says: "If the order had been given to a person of mature years, who had not engaged to do such work, although enjoined to obey the directions of his superior, it might with some plausibility be argued that he should have disobeyed it, as he

must have known that its execution was attended with danger; or, at any rate, if he chose to obey, that he took upon himself the risks incident to the service. But this boy occupied a very different position. How could he be expected to know the peril of the undertaking. He was a mere youth, without experience, and not familiar with machinery. Not being able to judge for himself, he had a right to rely on the judgment of Collett, and doubtless entered upon the execution of the order without apprehension of danger." In this case the decedent, a minor sixteen years of age, of average intelligence for one of his age, when he entered the service of the company defendant as a track hand assumed all the ordinary risks incident to that service, and the defendant was bound to accord to him the same protection as to unexpected or extraordinary hazards as it did to adult employes. When it seeks to be excused from culpable negligence on its part in that it failed to discharge its duty towards him in warning him of an unusual latent and dangerous hazard, on the theory that he acquiesced in its negligence and assumed the risk of hazard, his age, experience, and capacity, if not legally conclusive, are potent factors to be considered by the jury in arriving at a verdict. The defendant's instructions entirely ignore these factors, and propound the law as though he were an experienced adult, with all his powers of mind and body fully developed. If he had signed a written contract or deed waiving the discharge of the defendant's duties towards him in the most solemn and formal manner, the law would have held it void, and if he had entered into a parol agreement to the same effect, the law would have disregarded it; and yet the jury is instructed that they may find from his acts, knowledge and conduct that he released the defendant's legal duty towards him, and assumed the risk occasioned by the defendant's negligence, although at the time he was acting in obedience to the defendant's orders. Such a construction of the law is contrary to reason and experience. Boys of sixteen seldom stop to consider any danger to which they may be exposed, but rely implicitly on the superior judgment of those in authority over them. And is it not right that they should do

so, especially when any insubordination on their part subjects them to condign punishments? Is not such the teaching of both the Scriptures and the law? Shall we say in the language of the defendant's counsel, "Common sense would teach him, his own safety would require, and ordinary prudence dictate," that he should not place confidence in the superior intelligence, experience and knowledge of the trusted agent of the defendant, his superior officer, but that he should depend on his own youth, inexperience and lack of knowledge? The defendant would never countenance such a rule as this in its business. It would take a very strong case to make an infant employe contribute to his master's negligence by obeying his directions, which result in the former's death. Certainly the case now presented is not such a case, and therefore the defendant's instruction, though modified, should not have been given.

Third. The conclusions thus reached virtually dispose of the third assignment of error, which is to the refusal of the court to set aside the verdict as contrary to the law and evidence. The defendant's argument under this head is mainly as to the question whether the engineer sounded the whistle and caused the bell to ring, as required by the rule of the defendant, which is in these words: "Extra and delayed trains must sound the whistle frequently on approaching curves, and before passing obscure places." The engineer and other trainmen testify that the whistle sounded and the bell was rung just before and at the road crossing, about eight hundred feet from where the accident took place. The employes, not less than twelve in number, heard neither the whistle nor bell. This is established by their conduct, independent of their testimony, because if any of them had heard it it is safe to presume the accident would not have happened. Several other witnesses testified on the same subject. The jury had to weigh this evidence; for it is certainly conflicting and contradictory, depending entirely on the memories of the witnesses, their interest in the result of the trial, and other circumstances surrounding the case. But admitting that the whistle was sounded and the bell rung, as testified by the trainmen, can we say that it was a full compliance

with the rule of the defendant? It certainly did not accomplish the result intended. It could warn no one whose ears it did not reach, and it appears to have been heard only by those in the immediate neighborhood of the engine. Why the whistle was not sounded in the immediate neighborhood of the curve—the point of danger—no explanation is given. The engineer says the whistling at the road crossing, eight hundred feet away, was intended for the curve, because he expected some carpenters along on a truck or hand car, and yet he did not sound the whistle frequently, as the rule requires, but actually ran into the very carpenters he was expecting, without giving them any warning of his approach. The jury were certainly justified in finding that the engineer, as well as the foreman, was guilty of negligence in not obeying the rules of the defendant. The defendant insists that if the engineer and foreman were guilty of negligence, the boy was guilty of contributory negligence; that "his conduct under the circumstances was such as no man with a grain of sense or a particle of prudence would have been guilty of." Such language as this might be properly used toward the offending foreman or the other adult hands, seven in number, who were along with him, but is certainly hardly appropriate when applied to this poor, unfortunate boy, who in his earnest desire to serve his master in an acceptable manner, lost his life whilst strictly obeying the orders of his master, as represented by its foreman. He not only had the right, but was in duty bound to rely upon the care and superior knowledge of the trusted agent of his employer, under whose protection and charge he was placed. Wood Mast. and Serv. § 366; 4 Am. & Eng. Enc. Law, 42-61, note 1. This is a much stronger case in this respect than the *Fort Case*, referred to above. This boy was not sent into a dangerous place, but by the conduct of his superior "was lulled into a sense of perfect security," and then led into unexpected danger, and when the death trap is reached, the superior, by reason of his experience, activity, and good fortune, saves himself, and permits the innocent victim of his negligence to perish. For his confidence and obedience, the boy paid his life; for its negligence, the master should respond in damages.

Fourth. The last error assigned is that the damages allowed are excessive. Section 6, Chapter 103, of the Code, provides that: "In every such action the jury may give such damages as they shall deem fair and just, not exceeding ten thousand dollars." By the enactment of this law the legislature, as it had the power to do, gave the jury absolute control over the question of damages, within the limit fixed. The courts are clothed with no authority to disturb their findings, but are inhibited from so doing as positively as though plainly expressed in the language of the statute. They can neither enact, repeal, vacate, or amend legislative enactments within the limitations of the constitution, within which the legislature is supreme and the judiciary powerless. It has been held by the Court of Appeals of Virginia, in construing a similar statute, from which our statute was taken, that the measure of damages in the case of a man's death is not limited to the pecuniary value of his life to his estate; but may be exemplary, punitive, and given as a *solatium*. *Matthews v. Warner*, 29 Gratt. 576; *Railroad Co. v. Noell's Adm'r*, 32 Gratt. 394. This boy, according to the evidence, was strong, healthy, sixteen years of age, fatherless, and with a widowed mother. To hold that such a boy's pecuniary value to his estate by any table of probabilities was worth less than four thousand five hundred dollars would require very close calculation, exclusive of the cost and expense of litigation. But it is certainly evident that it was not the intention of the legislature for the jury to be limited in their finding to the probable pecuniary loss. The law was to operate as exemplary and punitive, as well as compensatory, but not penal, in any proper case. *Ricketts v. Railway Co.*, 33 W. Va. 433 (10 S. E. Rep. 801.) Any damages imposed in such cases are a forfeiture for the wrong done, occasioned by the neglect of a legal duty, and, so far as the aggressor is concerned, are intended to be corrective, in tender consideration of human life. A verdict of four thousand five hundred dollars will illy remunerate a widowed mother for the loss of a strong, healthy, industrious son of average intelligence, sixteen years of age, yet it is to be hoped that it may have the effect to either deter the defendant and other

similar corporations from employing minors in dangerous occupations, or to cause their agents to be more vigilant in protecting such youthful employes from the culpable negligence of those having them in immediate charge, and to whom they owe the duty of obedience.

In any view of this case, the damages found are not excessive, and no error has been committed to the prejudice of the defendant, and the judgment is therefore affirmed.

ON REHEARING,

In their able re-argument of this case, defendant's counsel present six points for further consideration.

"*First.* The engineer and fireman of the special engine were fellow servants of the decedent, a section hand on the track." This depends entirely upon the nature of the act or duty, as it relates to the decedent, they were called upon to discharge at the time of the accident. In some respects they were his fellow servants, but in giving him warning of the use of the track by a special train, they were discharging the non-assignable, personal, positive, or superior duty of the master, the defendant, in its corporate capacity. It has been well said that it would be a monstrous doctrine to hold that a railroad company could frame such schedules as would inevitably, or even probably, result in collisions and loss of life. *Lewis v. Seifert*, 116 Pa. St. 647, 11 Atl. 514. Having prepared and promulgated its schedule, it must adhere to it, and if it makes a change or violates such schedule, it is its positive duty to notify all who may be affected thereby of such change. When, in contravention of its schedule, it sends a "wild engine" over its track unexpectedly, it is in duty bound to warn all its employes who are rightfully on and using the track about its business, whether in charge of engine, train, or hand car, of the change in the schedule, and if it entrusts this duty to others, by bell, whistle, or otherwise, it makes such others its vice principals to that extent, and if they fail to discharge this duty, the company must answer for their negligence unless it be shown that the injured person contributed thereto. For instance, if the company had failed to notify Foreman Alley, by bell, whistle, or other-

wise, of the presence of a special train or obstruction on the track, and he had been injured thereby, he could recover, unless the defendant showed that he was under express instructions to be on the lookout for such special trains, and as a matter of precaution, to flag around curves and through cuts. In such case he would fail, not because of being a fellow servant with the engineer, but from contributing to his negligence. The company must protect its employes from all dangers created by itself or its authorized agents or agencies which such employes can not themselves foresee, or, by the use of ordinary prudence, avoid. For it must furnish them a safe place to work. To send "wild engines" and trains without any manner of warning or precaution over tracks already rightfully occupied by other employes is negligence in the highest degree criminal, in utter disregard of human life or limb, and worthy of the severest penalties the law can possibly inflict; and it is made less criminal by the degree of precaution taken to give the necessary warning, and only becomes excusable when the measures adopted are sufficient to protect such employes from threatened danger, provided they are free from fault themselves. It is not necessary to refer to decisions of other states to sustain or refute this doctrine, as the law is thus fully settled beyond controversy by numerous decisions of this Court, to wit: *Flanagan v. Railway Co.*, 40 W. Va. 436 (21 S. E. Rep. 1028); *Haney v. Railway Co.*, 38 W. Va. 570 (18 S. E. Rep. 748); *Core v. Railroad Co.*, 38 W. Va. 456 (18 S. E. Rep. 596); *Johnson v. Railway Co.*, 38 W. Va. 206 (18 S. E. Rep. 573); *Beuhring's Adm'r v. Railway Co.*, 37 W. Va. 502 (16 S. E. Rep. 435); *Daniel's Adm'r v. Railway Co.*, 36 W. Va. 397 (15 S. E. Rep. 162); *Criswell v. Railway Co.*, 30 W. Va. 798 (6 S. E. Rep. 31); *Madden v. Railway Co.*, 28 W. Va. 610; *Cooper v. Railroad Co.*, 24 W. Va. 37. In these, and many others, this Court is in accord with the decisions of the Supreme Court of the United States in the cases of *Randall v. Railroad Co.*, 109 U. S. 478 (3 Sup. Ct. 322); *Railway Co. v. Ross*, 112 U. S. 377 (5 Sup. Ct. 184); *Railroad Co. v. Baugh* (13 Sup. Ct. 914); 54 Am. & Eng. Ry. Cas. 328. See note on page 364, 54 Am. & Eng. Ry. Cas., where the doctrine is stated and authorities cited.

"*Second.* The plaintiff's decedent was guilty of contributory negligence." The duty of proving contributory negligence is on the defendant. To do this defendant proved that its foreman had been guilty of negligence in not flagging around the curve, and that by the rules of the company he was required to so do; so far only proving a further breach of its duty toward the decedent, making it liable under the decision of *Criswell v. Railway Co., supra*, for all damages sustained. It then showed that the deceased had been working for the company five or six months, and that he had often been sent to flag around curves, and that the foreman had been flagging around curves when he "was looking for a train or anything." When he knew there was no train, he did not flag. This is the only evidence tending to show contributory negligence. No knowledge of the rules of the defendant or of the duties of the foreman were brought home to the deceased, except what might be presumed from his limited observation and experience. As is said by Judge Green in the *Criswell Case*, he had the right to rely on the foreman's judgment and conduct, and that he would take every necessary care and precaution to protect him from unnecessary and unexpected dangers, and in doing so he did not waive the company's duty toward him, nor did he assume any dangerous risks of which he had no knowledge or information. How did the deceased know that the foreman was not doing his duty strictly? The evidence fails entirely to answer this question. As Judge Brannon says in *Gregory's Adm'r v. Railroad Co.*, 37 W. Va. 613 (16 S. E. Rep. 819): "Before we can say that the plaintiff's action shall be defeated by the mere existence of a rule, we must find that he had knowledge of it." The foreman himself was ignorant of the extent of the rule, and often neglected to observe it. Certainly his hands, who were not required to know or furnished with a copy of it, should not be presumed to have a more extensive knowledge than their foreman, for whose government it was made, and who was expected to be familiar therewith for the instruction and protection of those under him.

Right in this connection is the defendant's third point, to wit:

"Third. Turner, the party killed, was sixteen years of age, and having passed the age of fourteen, he was presumed to have had sufficient capacity and understanding to be sensible of danger and of having the power to avoid it, and this presumption should stand until it is overthrown by proof of the absence of such discretion and intelligence." The defendant's counsel apparently misunderstand the law as propounded in the opinion in relation to the age of the decedent, and that is that it is the duty of a master who knowingly employs a youthful servant, and subjects him to the control of another servant, to give him such warning of the dangers of his employment as his youth and inexperience require. In this case it is not shown that this boy was given any instruction as to the dangerous hazard of riding on this car around this curve without flagging. On the contrary he was led into the very jaws of death by the man who should have warned him and given him proper instruction. There is a great difference in the law as applied to the case of a minor who acts in disobedience to or without orders and one who acts in obedience to the commands of those having authority over him. In the former case the rule relied on by the defendant, and the authorities cited in support thereof, may apply, but in the latter case they have no application. but the rule is entirely different. A minor can not be expected to set up his opinion, however mature, against the judgment and experience of those maturer and older, to whom he is given in charge. But he is taught the lesson of obedience from his cradle, and he is required to respect the commands and pay deference to the judgment of his elders until legally emancipated at the age of twenty one years. And it would be an extreme case in which a minor should be held guilty of contributory negligence in obeying the orders of his foreman, representing his master. This is no such case, but is in line with the following cases, yet stronger than they: *Railway Co. v. Percgoy*, 36 Kan. 424 (14 Pac. 7); *Dowling v. Allen*, 74 Mo. 13; *Hill v. Gust*, 55 Ind. 45. In the case of *Railway Co. v. Bridges*, 92 Ga. 399 (17 S. E. Rep. 645) it was held that "the evidence showing affirmatively that the plaintiff was injured while engaged in the line of his

duty, under the orders and in the immediate presence of the 'boss' to whose orders he was subject, and the injury was the result of negligence attributable to the company—either the sole negligence of the 'boss' or the joint negligence of him and of absent officers or employes with whom he should have co-operated in so regulating the movements of his hand car as to prevent a collision between it and a train—a recovery by the plaintiff would be defeated only by fault on his part amounting to rashness or recklessness in obeying under the circumstances the orders of the boss." It is impossible to say in the light of the evidence that this boy was guilty of rashness or recklessness in obeying the orders of his foreman.

"Fourth. The former opinion herein recognizes, permits and commends the doctrine of punitive damages, contrary to the former adjudications of this Court." The question of punitive damages does not properly arise in this case. No instructions as to the amount of damages were asked or given, but the jury was left free to find under the statute such damages as they should deem just and fair. The doctrine of punitive damages should be the same in cases where death ensues from acts of negligence as where it does not ensue, in accordance with the law as given in the case of *Mayer v. Frobe*, 40 W. Va. 246 (22 S. E. Rep. 58) which overrules *Pegram v. Stortz*, 31 W. Va. 242 (6 S. E. Rep. 485) on which the defendant mainly relies.

As to circumstances under which corporations would be subject to the infliction of punitive damages, see *Ricketts v. Railway Co.*, 33 W. Va. 433 (10 S. E. Rep. 801); *Dorney v. Railway Co.*, 28 W. Va. 732, 743.

"Fifth. The right given a jury by section 6 of chapter 103 of the West Virginia Code to assess damages not to exceed ten thousand dollars, wherever the death of a person has been caused by a wrongful act, is not a right that it may be exercised arbitrarily, but the exercise thereof is always subject to proper correction and control by the court, under the established rules of law." The fifth point of the syllabus as propounded in this case, relates only to the amount of the verdict, and is simply to the effect that there being no other

question of law or evidence presented, the court can not disturb the verdict of the jury as either too great or too small for the very reason that the legislature, as it had the right to do, has lodged with the jury the sole power to determine the amount of the damages, and for the court to interfere with this power is to usurp legislative functions, and under the pretense of legal construction, to repeal, alter, or change a plain legislative enactment, about which there can be no two distinct and different opinions. That this point of the syllabus may be easier of comprehension, and leave no question of doubt within proper limitations, it has been deemed advisable to add the following words: "Unless the verdict evinces passion, prejudice, partiality or corruption on the part of the jury." *Battrell v. Railway Co.*, 34 W. Va. 232 (12 S. E. Rep. 699). Nothing of this kind, however, is claimed.

But the only reason relied on is as given in defendant's last point, to wit: "(6) In the case at bar, the evidence failed to furnish any proper data upon which to base a verdict or judgment." A boy sixteen years of age, robust and healthy, a good worker, employed as a track hand or day laborer by the defendant; a widowed mother who appeared and testified before the jury. From these facts the inferences naturally follow: That he was receiving the ordinary wages of a laborer of his class; if he was not, the defendant employed him, and could have so shown. That his mother depended on his wages, for if not, he would not have been at work; the minor sons of the wealthy, or even the well to do, at sixteen years never labor as repair hands. These are both matters of common observation, within the knowledge and experience of the ordinary jurymen. *City of Chicago v. Hesing*, 83 Ill. 204. The amount of damages is a question of fact, and not of law. *City of Joliet v. Weston*, 123 Ill. 641 (14 N. E. Rep. 665); *City of Salem v. Harvey*, 129 Ill. 344 (21 N. E. Rep. 10). While courts are supposed to know and administer the law, the jury determine the facts. With their determination the court ought not to interfere unless it is in a form to shock the understanding and impress no dubious conviction of their prejudice and passion on the mind of the

court. *Grah. & W. New Trials* 452; *Zinc Co. v. Black's Adm'r*, 88 Va. 300 (13 S. E. Rep. 452); *Trice v. Railway Co.*, 40 W. Va. 271 (21 S. E. Rep. 1022). There is nothing in this case "to warrant the belief that the jury must have been influenced by partiality, prejudice, or passion, or have been misled by some mistaken view of the merits of the case" *Boster v. Railway Co.*, 36 W. Va. 318 (15 S. E. Rep. 158).

For the foregoing reasons, the former conclusion arrived at is ratified and affirmed.

ENGLISH, JUDGE (*dissenting*):

I can not concur with the opinion expressed by the majority of the Court in this case, for the following reasons: The record discloses the fact that the plaintiff's intestate was a laborer in the employ of the defendant, and at the time he received the injury which caused his death was riding upon a hand car on his way to his work. He was sixteen years of age, of "tolerably fair size, and a good worker." So far as appears from the testimony, he was performing the labor of a man, and receiving a man's wages. At that age he was as capable of taking care of himself, as a young man eighteen, twenty or twenty two years of age, and it appears to me an injustice would be done to discriminate against boys who were capable of performing the labor of a man by holding that a greater responsibility or liability rested upon their employers in protecting them from injury or accident while engaged in their employment than is required by such employer in reference to those who have arrived at the age of twenty one years.

I can not believe that the law intends that when a young man presents himself as an applicant for work, before employing him the employer must stop and inquire whether he is twenty one years of age, or if he does not so inquire, that any greater responsibility devolves upon him as to such young man than would if he was twenty one or twenty five years of age.

In the case of *Nagle v. Railroad Co.*, 88 Pa. St. 35, Judge

Paxton, in delivering the opinion of the court, says: "The law fixes no arbitrary period when the immunity of childhood ceases and the responsibilities of life begin. For some purposes, majority is the rule. It is not so here. It would be irrational to hold that a man was responsible for his negligence at twenty one years, and not responsible a day or a week prior thereto. At what age, then, must an infant's responsibility for negligence be presumed to commence? This question can not be answered by referring it to the jury; that would furnish us with no rule whatever. It would give a mere shifting standard, affected by the sympathies or prejudices of the jury in each particular case; one jury would fix the period of responsibility at fourteen, another at twenty or twenty one years. This is not a question of fact for the jury; it is a question of law for the court." After citing several authorities, as to the age when a guardian may be selected, and as to when he may be guilty of crime, he says: "We have thus seen that the law presumed that at fourteen years of age an infant has sufficient discretion and understanding to select a guardian, and contract a marriage; is capable of harboring malice and taking human life under circumstances that constitute the offense murder. It therefore requires no strain to hold that at fourteen an infant is presumed to have sufficient capacity and understanding to be sensible of danger, and to have the power to avoid it. And this presumption ought to stand until it is overthrown by clear proof of the absence of such discretion and intelligence as is usual with infants of fourteen years of age."

The witness Alley shows that this young man was not without experience, that he had been working on the road before he commenced working for him, and in my view of the case, he occupied precisely the same attitude as any other hand on the road, and in entering the service of the defendant he assumed the risks incident to his employment to the same extent precisely, no greater and no less, than others engaged in performing the same services.

At the time the accident occurred, the plaintiff's intestate was on his way to work, riding on a hand car, and, al-

though he was aware that no flag had been sent in advance by the foreman, yet he remained on the hand car, and took the risk of going around the curve into the deep cut, and thus met his death. It does not appear that deceased was ordered to get on the hand car by any one. It was his voluntary act; it was his means of locomotion towards his work. He could have walked through the cut as well as to have gone on the hand car. The defendant had nothing to do with causing or requiring him to select this mode of traveling to his work. If then, the fact of his being on the hand car contributed to his death, he voluntarily adopted that mode of travel, and thus contributed to his misfortune. He went thus with full knowledge that the flag had not been sent forward.

The declaration avers that the injury was caused by defendant running its engine around a sharp curve and through a deep cut without ringing a bell or blowing a whistle, or giving any warning whatsoever against said hand car. As to ringing the bell, however, and sounding the whistle, the testimony is overwhelming that both were done, and the injury is not occasioned by the failure to use these precautions, and it does not appear that any fault could be attributed to the defendant in the management of the engine, and, the decedent having voluntarily gone into this cut without any precaution, I think he was guilty of contributory negligence, and could not recover.

CHARLESTON.

UNITED STATES BLOWPIPE CO. v. SPENCER *et al.*

Submitted June 22, 1894—Decided April 17, 1895.

1. LIEN.

A lien is the ligament or tie which binds certain property to a particular debt for its payment or satisfaction.

2. MECHANIC'S LIEN.

What is known as the "mechanic's lien" on real estate and buildings is the creation of statute. It was unknown at common-law, but the right given by statute to enforce it in a court of equity carries with it all the rights incident to that court's principles and rules and its methods of procedure.

3. MECHANIC'S LIEN—STATUTORY REQUIREMENTS.

Such lien can be maintained only by a substantial observance of and compliance with the requirements of the statute, but the statute is given a fair and and liberal construction as to the creation of the lien and its enforcement.

4. MECHANIC'S LIEN—STATUTORY REQUIREMENTS.

In ascertaining whether the account which is required to be filed and recorded to create the lien is a substantial compliance with the statute in respect to designating the name of the owner of the property, the account proper, and the sworn statement annexed thereto, may be read together.

5. MECHANIC'S LIEN—CONSTRUCTION OF STATUTES—MATURED LIABILITY.

Section 4 of chapter 75 of the Code, which requires a just and true account of the amount due after allowing all credits, to be sworn to and filed for record, uses the term "due" in the sense of an existing liability, without reference to whether it be then matured and enforceable by suit or not matured and not then enforceable by suit.

6. CHANCERY PLEADING—BILL IN CHANCERY.

A bill framed with a double aspect, but upon consistent states of facts, praying relief in the alternative, is not for that reason open to objection.

TOMLINSON & WILEY for appellant, cited Code 1891, p. 653; Phil. Mech. Lien (2d Ed.) 27, 583; 46 Mo. 595; Id. 337; 9 Nev. 219; 48 Miss. 360; 30 Ark. 573; 4 W. & S. 458; 52 Ala.

40	698
40	551
40	698
46	591
46	596
46	804
46	608

40	698
58	165
58	166
58	170
58	368
40	698
60	253
40	698
61	193

256; 2 Swan, 313; 4 Col. 251; 7 Cal. 358; 72 Me. 422; 4 W. Va. 600; 15 Am. & Eng. Enc. Law 165, 167, 168; 116 Mass. 376; 46 Am. Dec. 327; Pac. Rep. 810; 67 Me. 548; 6 Pet. 36; 24 N. Y. 283.

CHAS. E. HOGG for appellee, cited 88 Ind. 307; 29 Cal. 283; 39 N. J. L. 139; 2 Hill 365; 8 Blackf. 252; 5 Blackf. 329; 21 Ill. 431; 3 Ill. 472; 1 W. Va. 249; 1 Bouv. Law Dict. Tit. Due, p. 512; Drake Attach. (7th Ed.) §§ 27-33; Code, c. 106, s. 1; Id. c. 50, s. 121; 8 W. Va. 384; 33 W. Va. 65; 10 S. E. Rep. 36; 37 W. Va. 641; 2 Cal. 90; 2 Greene 508; 10 Md. 257; 3 Minn. 86; 18 Miss. 627; 37 Pa. St. 125; 50 N. Y. 360; 45 Ga. 159; 46 Tex. 196; 77 N. C. 77; 33 Mo. 396; 35 Mo. 107; 45 Ind. 258; 36 N. Y. (Sup. Ct.) 337; 30 Ark. 682; 57 Ind. 262; 58 Ind. 477; 52 Tex. 621; 8 Mo. App. 566; 83 Mo. 313; 40 Ill. 62; 21 S. W. Rep. 471; 62 Iowa 280.

J. S. SPENCER for appellees, cited 10 W. Va. 251; 28 W. Va. 623, 629; 30 W. Va. 274; 29 Gratt. 125; 1 Bart. Ch. Pr. 256; Sto. Eq. Pl. § 530; 11 W. Va. 238; 20 W. Va. 210; 30 W. Va. 248, 269; 31 W. Va. 601; 26 Gratt. 296; Adams Eq. 311 (margin); 2 Jones Liens, § 1588 and cases cited; Phil. Mech. Liens (3d Ed.) §§ 402, 409; 15 Am. & Eng. Enc. Law 156 and authorities cited; 33 W. Va. 63; Code, c. 75, s. 4; 8 W. Va. 384; 9 W. Va. 231; 42 N. W. 358; 2 Jones Liens § 1397 and cases cited; Phil. Mech. Liens (3d Ed.) § 345 and cases cited; 22 Neb. 656; 59 Md. 469; 35 Minn. 192; 28 Minn. 404; 43 Cal. 515; 2 Idaho 1164; 15 Am. & Eng. Enc. Law 138 and authorities cited; 18 W. Va. 593; 15 Am. & Eng. Enc. Law 146, note 4; Phil. Mech. Liens (3d Ed.) § 366; 2 Jones Liens, §§ 1554-5 and notes; 38 Mich. 587; Phil. Mech. Liens (3d Ed.) § 14; Code, c. 139, s. 5; 27 W. Va. 566; 18 W. Va. 586, 596; 37 W. Va. 59, 571; Hutch. W. Va. Treatise, § 958, form 250; Phil. Mech. Liens (3d Ed.) 598; 2 Jones Liens, § 1390; 37 W. Va. 643; 38 W. Va. 596, 701; Bouv. Law Dict. Title Due; 17 Wis. 181.

HOLT, PRESIDENT:

This is a suit in equity brought in the Circuit Court of Mason county on the 19th day of December, 1892, by plaintiff

against J. S. Spencer, the Point Pleasant Furniture Company, etc., to enforce a mechanic's lien against the property of the furniture company and for other relief.

On the 10th day of May, 1893, four of the defendants suggested the non-residence of plaintiff, and required security for costs; and, the security having been given, they demurred to plaintiff's bill. The court sustained the demurrer, and plaintiff desiring to amend, on its motion the cause was remanded to rules for that purpose. The amended bill having been filed, and the cause again on the court docket for hearing, the same four defendants demurred to the amended bill. The court, on December 19, 1893, sustained the demurrer, and the plaintiff declining to further amend, the bill and amended bill were dismissed, with costs, and this appeal was allowed the plaintiff. The grounds of demurrer are:

First. The bill and amended bill are multifarious.

Second. Plaintiff does not, by its pleading, show itself to have a valid mechanic's lien; has not complied with the statute, and therefore has nothing that fastens the claim to the property for its satisfaction; is a mere creditor at large, with no standing in a court of equity as a lienor against the property in question.

In our chancery practice it is usual in an amended bill to introduce supplementary matter, if necessary, without any additional designation of the bill itself. The bill is taken for what it shows itself to be, without regard to the name that may be given it. The plaintiff may, at any time before or after the appearance of the defendant, in the vacation of the court, file in the office an amended bill or supplemental bill, and have a summons to answer it. But if the court shall be of opinion that the same was improperly filed, it will dismiss such bill, at the costs of the plaintiff. This is done on motion, not by demurrer.

The scheme of the original bill is: That plaintiff has a mechanic's lien on the real property of the Point Pleasant Furniture Company for one thousand seven hundred and twelve dollars and fifty cents, duly recorded on July 12, 1892, but that the furniture company had, on the 11th day of December, 1891, by deed of trust of that date, conveyed its

property to defendant J. P. R. B. Smith, trustee, to secure the payment of four notes—one for two thousand eight hundred and seven dollars, to J. J. Bight; and three others, making five thousand dollars in all—payable in ten years from that date, but interest payable annually. The trustee was authorized to sell under the deed of trust for cash in default of payment of principal when due, or of interest, or on failure of the furniture company to keep the property insured to at least the amount of five thousand dollars. That the trustee, in violation of his trust, without giving the notice required by law, and before the trust was due, viz. on the 5th day of December, 1892, sold the property, not for cash, but on credit, to defendant James P. Hayes for nineteen thousand three hundred dollars, a grossly inadequate price. That the property sold was worth at least fifty thousand dollars. That although the sale was for cash, yet there was a contract and agreement between the trustee and defendant Hayes by which Hayes was to pay only a part of the purchase-money in cash, and the balance on time, thus giving Hayes, the purchaser, an unfair advantage over the other bidders, which ought not to have been permitted. That defendant Hayes paid but a part of the purchase-money, and has failed and refused to comply with the terms of sale. That the trustee has failed and refused to pay plaintiff's mechanic's lien, and the mechanic's lien of the defendant the Moore Carving Machine Company, amounting to one thousand two hundred and sixty two dollars. Plaintiff prayed that the sale under the deed of trust might be set aside, and the property legally and properly resold; and after payment of the debts secured by the trust deed, plaintiffs' claim should be next paid; but if the sale made by the trustee should be held to be legally and properly made, that in that event the trustee should be directed to pay the mechanic's lien next after the debts secured by the deed of trust; and for general relief. The same allegations are repeated in the amended bill, with the additional allegation that on the 6th day of February, 1893, a judgment was rendered in favor of plaintiff against the defendant the Point Pleasant Furniture Company for one thousand seven hundred and seventy two dollars and thirty

cents, being on the same account for which it had its said mechanic's lien; and on the same day a judgment was rendered against said furniture company in favor of defendant the Moore Carving Machine Company for one thousand two hundred and ninety five dollars and fifty five cents, the same account for which it had said mechanic's lien. Of these judgments copies are filed as exhibits. That the trustee has, since the sale, and out of the proceeds, paid off all the other liens, viz. the defendant Tinsley, the Bradford Milling Company, the Buss Machine Works, the Lane & Bodley Company, and Laidlaw & Dunn Company, although all their liens were subsequent to the lien of plaintiff and the lien of the Moore Machine Company, and that there is still left in the hands of the trustee the sum of three thousand and twenty six dollars and seventy five cents.

This did not have the effect to render the bill multifarious. I know of no reason why plaintiff might not properly have obtained against its debtor the furniture company a judgment at law for its claim, as was done in this case. Such was its right whether the mechanic's lien was valid or invalid. It obtained such judgment without objection. Why should it not inform the court that it had obtained a judgment at law against its debtor for such claim, which it had been and was seeking by its original bill to enforce as a mechanic's lien? It did not and could not affect the mechanic's lien. It did not make it better or worse, but made its pleadings correspond with the change in fact which had taken place in regard to defendant's account. There are several reasons why it may be permitted to obtain its judgment at law: *First.* The plaintiff thereby establishes the justice of its claim, and ascertains the amount; so that there can be no claim that defendant has been deprived of his right of trial by jury. *Second.* It is in no way inconsistent with the lien. A party who has a vendor's lien may also sue and obtain a judgment at law, thus making his claim also a judgment lien. *Third.* That this may be done is contemplated by the statute itself, for section 12 of chapter 75 of the Code (the chapter which authorizes the creation of the lien) provides that "the court of chancery may, in addition, give a personal decree in favor

of such creditors for the amount of their claims against any party as to whom they may be established, such decree to have the effect of and to be enforced as other decrees for money." Section 1 of chapter 139 provides that "a decree or order requiring the payment of money shall have the effect of a judgment * * * 'for such money,' and be embraced by the word 'judgment,' where used in this or any of the three succeeding chapters." And section 5 of the same chapter provides that "every judgment for money rendered in this state heretofore or hereafter against any person, shall be a lien on all real estate of or to which such person shall be possessed or entitled, at or after the date of such judgment;" and by section 7 "such lien may be enforced in a court of equity." See Phil. Mech. Liens (3d Ed.) § 448, p. 760; *Bedsole v. Peters*, 79 Ala. 133. See, also, *Glacius v. Black*, 67 N. Y. 563. I can therefore see no reason why the judgment obtained at law in the interim should in any degree add to or take from the mechanic's lien, or how the bringing into the case by the amended or supplemental bill this new status of plaintiff's claim could have the slightest effect in making its bill multifarious. It may be that the court would decline to enforce it because of its being a new lien, which did not exist when the suit was brought; but it is the same claim which has now passed into judgment, and that allegation does not render the bill multifarious, as may be easily shown by supposing the fact and allegation to be that the judgment at law had been obtained before the institution of the suit in chancery. See *Guano Co. v. Heatherly*, 38 W. Va. 409 (18 S. E. Rep. 611).

The deed of trust is an older and higher valid lien on the same property. That the plaintiff concedes, but its complaint is that the trustee made a sale improperly and illegally, to plaintiff's injury, and it asks that such sale may be set aside, and the property legally and properly sold under the direction and supervision of the court. But if the court should hold such sale by the trustee to be valid, then plaintiff asks that the surplus may be applied *pro tanto* in satisfaction of its lien. As to this, the plaintiff alleges but one state of facts, or, if two, they are not inconsistent; and it adapts its alternative prayer for relief to meet each one of two views

that may be taken of this state of facts. If plaintiff's view is correct, that an illegal sale has been made, to its injury, then one prayer meets that view of the case; but if the sale is valid, or is one of which plaintiff can make no proper complaint because not injured, then its other prayer is that it may be paid out of the surplus. It is the common every day case of a bill framed with a double aspect, and it is based on one set of consistent facts, and no two contradictory or inconsistent states of facts are alleged.

Each one of these four defendants who demur is a proper party, and they have no right to complain for other people, who do not themselves complain that such other persons are not proper parties defendant. James P. Hayes is a proper party, because he was the purchaser of the property at the trustee's sale, which plaintiff says was illegal and invalid; and which it asks to have set aside; the other three, because they are creditors by mechanics' liens, who have been paid out of the proceeds of such sale, whose liens are alleged to be younger and inferior in order of rightful payment to the lien of plaintiff.

This brings us to the main question discussed by counsel, does plaintiff show itself to have a valid subsisting mechanic's lien on the real estate in controversy? The bill must allege all the facts necessary to create the lien, for it is purely a creation of the statute, having nothing else to stand on. This is but a special application of the universal rule that the decree pronounced must stand justified by the pleadings as well as by the proof, and here it is decided as though all the allegations were true; for reasonable presumptions of fact, are admitted by demurrer, as well as the matters expressly alleged; but it does not admit matter of inference or argument. For example, in this case, plaintiff expressly alleges that its lien is valid; that all things required by the statute to create it were properly done and performed, averring them severally and specifically. But this is not taken as true, for the lien itself is exhibited, and as to the construction to be put upon it, that is a question of law for the court.

A lien is said to be the ligament which binds certain property to a certain debt or claim for its payment or satisfaction.

At common-law it was the fact of possession in certain cases. It may be created by contract expressly or impliedly, or it may be created by statute. Prior to the first day of July, 1850, in this state, the vendor of real estate had an implied lien for the payment of the purchase-money, even after a conveyance in which no lien was retained. Since that time he only has such lien by expressly reserving it on the face of the conveyance; but as long as he retains the legal title, he has the power of reserving it, unless he expressly agree not to reserve it. "A mechanic has a lien at common-law for labor done upon a chattle as long as he retains possession of it, but a mechanic or laborer can not retain possession of real property upon which he has performed labor." 2 Jones Liens, § 1184.

The mechanic's lien on buildings, *etc.*, and the land on which they are erected, as we know it, is the creature of statute, and was unknown at common-law or in equity. Phil. Mech. Liens (3d Ed.) § 1. But soon after the adoption of the federal constitution the states commenced to pass statutes creating such liens, in order to encourage the erection of buildings, and the improvement of town lots and real estate generally. Maryland came first, with the act of December 19, 1791; Pennsylvania with the act of April 1, 1803. Our first act upon the subject was passed February 21, 1843 (Acts 1842-43, p. 52). See Code, 1849 (Ed. 1860) p. 567. And for labor done and material furnished see act of 1852 (page 242) local to Alexandria. The whole subject has been of gradual growth; but it has been extended, advanced and encouraged and methodized until it now prevails in all states; and "while each state may have its own mechanic's lien law, which is rarely identical in every particular with that of another, yet all of them, having the same object in view, are, in their main provisions, very much alike, and in some instances mere re-enactments of each other." See Phil. Mech. Liens, § 8 *et seq.*; 2 Jones Liens, § 1186 *et seq.* Our law on the subject is found in chapter 75 of the Code. See Ed. 1891, p. 652. Our first case on the general subject is *Laege v. Bossieu*, (1859) 15 Gratt. 83, opinion by Judge Lee, where the act is given a construction plainly intended not to restrict, but to

advance the remedy, applying to it the general principles of equity, and not confining it to the act, after the lien is once created. But our present law, in its main outlines, first took definite shape in the Code of 1868. See chapter 75, p. 475. *Bodley v. Denmead* (1866) 1 W. Va. 249, was under the act of February 2, 1853, which was local, being confined to the city of Wheeling. Under the general law we have *Mayes v. Ruffners* (1875) 8 W. Va. 384; *McKnight v. Washington*, Id. 666; *Stouts v. Golden*, 9 W. Va. 231; *Manufg Co. v. Brockmeyer*, 18 W. Va. 586; *Phillips v. Roberts*, 26 W. Va. 783; *McGugin v. Railroad Co.*, 33 W. Va. 63 (10 S. E. Rep. 36); *City of Wheeling v. Baer*, 36 W. Va. 777 (15 S. E. Rep. 979; *Richardson v. Railway Co.*, 37 W. Va. 641 (17 S. E. Rep. 195).

In this case, the plaintiff, for an agreed consideration and price, on the 10th day of June, 1892, furnished, delivered and placed on the premises of the Point Pleasant Furniture Company, in Mason county, W Va., certain machinery in the bill and proceedings mentioned and described, at the agreed price of one thousand seven hundred and twelve dollars and fifty cents, ceasing to labor, etc., on that day, and filing in the clerk's office of the County Court of Mason county, for record, their account, on the 12th day of July, 1892.

By section 2 of chapter 75 it is provided, among other things, that "every mechanic * * * or other person who shall perform any work or labor upon, or furnish any material or machinery for constructing * * * any house * * * manufactory or other building * * * fixtures * * * or other structure by virtue of a contract with the owner or his authorized agent, shall have a lien to secure the payment of the same, upon such house or other structure, and upon the interest of the owner in the lot of land upon which the same may stand or to which it may be removed." Section 4: "Every lien provided for in the second and third sections shall be discharged unless the person desiring to avail himself thereof shall, within sixty days after he ceases to labor on or furnish material or machinery for such building or other structure, file with the clerk of the County Court of the county, in which the same is situated, a just and true account of the amount due him after allow-

ing all credits, together with a description of the property intended to be covered by the lien, sufficiently accurate for identification, with the name of the owner or owners of the property, if known; which account shall be sworn to by the person claiming the lien or some person on his behalf." The account required to be filed for record must show four things: (1) The just and true account due the lienor after allowing all credits. (2) A description of the property intended to be covered by the lien, sufficiently accurate for identification. (3) The name of the owner of the property, if known. (4) The account must be sworn to by the person claiming the lien, or by some one in his behalf.

The account filed in this case consists of an itemized statement of the material and machinery furnished and work and labor done, with a sworn statement thereto attached as part thereof; and the two must be read together for our purpose as parts of one whole, called by the clerk who recorded it the "mechanic's lien." In this case the sworn statement says: (1) There are no credits or set-offs to said account other than are stated in the account, which is just and true, and for which defendant is debtor to plaintiff; and that there remains unpaid, after allowing all set-offs and credits, the sum of one thousand seven hundred and twelve dollars and fifty cents. (2) That the property upon which the work and labor was performed and for which said material was furnished, as charged in the foregoing account, and upon which it is hereby intended to take a mechanic's lien, is situate in the town of Point Pleasant, Mason county, W. Va., being two certain lots (giving the number and location of each) and a certain tract of land adjoining (giving its metes and bounds) "being the same lots and tract of land conveyed to the Point Pleasant Furniture Company by the Kanawha Lumber and Furniture Company, by its deed, bearing date on the 11th day of December, 1891, and of record in the clerk's office of the County Court of said Mason county in Deed Book No. 51, pp. 342 and 343, to which deed reference is hereby made." The just and true account of the amount due, which is required to be sworn to and filed, can not mean only an account past due (one on which a suit can then be maintained) but it means

owing (the state of indebtedness) whether then enforceable by suit or not. Under any other construction, it would be impossible for the builder to give the owner of the property any time in which to pay, and at the same time acquire his mechanic's lien, whereas section 11 of chapter 75 treats him as a valid lienor, who, at the time of filing his lien, can give the owner any extension of time in which to pay, short of six months. Why should he be required to swear that it is past due when it has five months to run? See *Albrecht v. Lumber Co.* (1890) 126 Ind. 318 (26 N. E. Rep. 157). On its face it appears to be due. *Hills v. Ohlig* (1883) 63 Cal. 104; Phil. Mech. Lien, §§ 282, 290. As to these two requisites, no complaint can be made that they are insufficient, or in any respect defective. But complaint is made that there is no sufficient designation of the name of the owners, and I think the objection would be well taken if the designation given in the description of the property stood alone. But it does not, and when read in connection with the account proper, it names and designates the owner in a plain and unequivocal manner; one that is obvious, and can not be misunderstood; and is at least a substantial, if not a literal compliance with the statute. In the account proper plaintiff states that the machinery furnished "was delivered and placed on the premises of the said Point Pleasant Furniture Company, and that the extra work and labor was done in and upon said premises in the affidavit hereto attached, described;" and in the affidavit it is called "the property," being two lots and five acres, which were conveyed to the Point Pleasant Furniture Company by deed dated December 11, 1891, as above recited. The president of the blowpipe company swore to the account in behalf of his company, and virtually said in so many words: "This account for one thousand seven hundred and twelve dollars and fifty cents is a just and true account, due said company, after allowing all credits. The following is a description of the property intended to be covered by the lien, viz.: Lot No. 1 in tier 6, and lot No. 1 in tier 5, of the town of Point Pleasant, and a certain tract of land, estimated to contain five acres (giving the metes and bounds) being the same lots and tract of land conveyed to the Point Pleasant

Furniture Company by the Kanawha Lumber and Furniture Company by its deed bearing date on the 11th day of December, 1891, and of record in the clerk's office, etc., to which deed reference is here made; which said premises described in said deed are the premises of the said Point Pleasant Furniture Company." "Premises," the real estate conveyed (in this case conveyed in fee simple) with reference to the deed of conveyance, is also used in describing the property. I do not see how any more positive, explicit and unequivocal designation could be made of the name of the owner. It is in this regard a substantial observance of and compliance with the requirements of the statute, that has been held to be sufficient. *Mayes v. Ruffners*, 8 W. Va. 384. See Hutch. W. Va. Treat. § 958, form 250. See Phil. Mech. Liens (3d. Ed.) § 345; 2 Jones, Liens, § 1400; 1 Bart. Ch. Prac. 166; 15 Am. & Eng. Enc. Law 125. Thus read, it not only designates the owner, giving him information of the amount and character of the claim intended to be fixed as a lien upon his property, but gives to all notice that he has an estate in fee simple, and the legal title to the property, showing when, how, and to what extent and interest he became owner. On the subject generally, see *Montandon v. Deas*, 14 Ala. 33; *Lyon v. McGuffey*, 4 Pa. St. 126; *Chapin v. Paper Works*, 30 Conn. 461; *Rees v. Ludington*, 13 Wis. 276.

Being of opinion that the plaintiff has shown a valid, subsisting mechanic's lien on the property, it is not necessary to discuss the question whether it has also a judgment lien. This would depend on the question whether the three thousand and twenty six dollars and seventy five cents resulting from the sale under the deed of trust, and paid over by the trustee, and now in the hands of the general receiver of the court, is to be regarded as real or personal property. The general rule is that where real estate is sold under a deed of trust for the payment of the debt charged therein, the character of the property is only regarded as changed from realty to personalty, so far as may be necessary to pay such debt, and the residue is still treated in equity as real estate. The question, however, may depend upon the provision in the deed of trust; but in this case there is none. It is silent on the

subject; and it would be to some extent determined by the language of the statute, which provides that the trustees shall pay the surplus, if any, to the grantor, his heirs, personal representatives, or assigns. The owner being a corporation did not have the effect to change it into personalty, for it is authorized to hold a certain amount of real estate (see chapters 52-54, Code) and as the lien of the judgment, if any, is wholly independent of the deed of trust, is created by law as applicable to the judgment debtor's real estate, a court of equity would regard it as still realty, if not impressed by some other act or order of the court with the character of personalty, before plaintiff's judgment was obtained; and no such act or order directing such conversion appears in this record. So that if it were necessary to the point, such surplus, after paying the trust debts, would still be regarded as land. See *Fowler v. Lewis' Adm'r*, 36 W. Va. 112, 150, 156 (14 S. E. Rep. 447).

From the view of the case here expressed it results that the demurrer of the defendants the Buss Machine Works, the Lane & Bodley Company, the Laidlaw & Dunn Company, and James P. Hayes to plaintiff's amended bill should have been overruled.

Therefore the decree of September 19, 1893, sustaining the demurrer and dismissing plaintiff's bill and amended bill is reversed, and the cause is remanded for further proceedings to be had therein. Reversed and remanded.

ON REHEARING.

It is insisted by counsel for appellee that the claim of mechanic's lien of the Moore Carving Machine Company is clearly insufficient, and invalid as a lien, because there is in the affidavit no positive designation of the owner of the property, and because the account filed therewith is no meagre of explanation and barren of statement as not to aid the affidavit, when used in connection therewith, on the question of ownership. The answer to this is that the United States Blowpipe Company is the only plaintiff, and its bill was finally dismissed by the court below on demurrer, and the sufficiency of its

own case, as made by the bill, is the only question before us. And it appears that the defendant Moore Carving Machine Company had a judgment at law for their claim, and this, it was said in argument, without contradiction, had been paid.

As to the validity of the plaintiff's lien—the only one before us on this demurrer—we need only say that a re-examination of the record and authorities has led us to our original conclusion.

ENGLISH, JUDGE (*dissenting*).

CHARLESTON.

HUNTINGTON & KENOVA LAND DEVELOPMENT Co. v. PHOENIX POWDER MANUF'G Co.

Submitted January 15, 1895—Decided May 1, 1895.

1. NUISANCE.

A mill, manufacturing powder and other explosives, and storing the same on the premises, situate on the bank of the Ohio river and near two railroads and a public road, is a nuisance *per se*. *Wilson v. Manufacturing Co.*, 40 W. Va. 413.

2. NUISANCE—MANUFACTURING EXPLOSIVES—INJUNCTION.

When a company engaged in the manufacture of powder and other explosives, without misrepresentation or concealment on its part, is induced to locate its works at great expense on lands adjacent to the property, and for the prospective benefit of a land development and improvement company, such latter company can not, on discovering that the proximity of such powder works has diminished instead of enhanced the value of its adjoining territory, enjoin the continuance of such works as a nuisance.

SIMMS & ENSLOW for appellant, cited 2 Wood Nuis. (3d. Ed.) § 820; 1 High Inj. (3d. Ed.) § 762; 13 W. Va. 476; 32 W. Va. 6; 34 W. Va. 804; High Inj. § 34, p. 786; 80 Va. 331; Wood Nuis., § 3, p. 4; Wood Nuis., § 820, p. 804; 9 Wallace 254; 18 B. Monroe 800; 1 Johnson 78; Eden Inj. 274; 11 Humphrey (Tenn.) 406.

CAMPELL & HOLT for appellees:

- I.—*The determination of the question, whether nuisance or no nuisance, when the matter complained of is not a nuisance per se, depends upon its location and the attendant circumstances; and the plant in question is not a "convenient" place.*—H. L. Cases, 648; Wood Nuis., p. 532, § 492; 34 W. Va. 804.
- II.—*The utility, and even the necessity, of the business, is no defense. Neither does it make any difference that the best appliances known to science have been adopted and the greatest degree of care exercised in carrying it on.*—3 L. R. 330; 18 Minn. 324; 23 N. E. Rep. 389; Wood Nuis., §§ 73, 115, 130, 142; 8 N. Y. 579; 1 Swan. 213; 2 Scam. 67; 39 Ill. 600; 41 Ill. 502; 5 Ill. 24; 6 Hill 292; 2 N. Y. 159; 47 Ga. 263; 2 Scam. 434; 74 Pa. St. 230.
- III.—*If several persons receive a private injury from a public nuisance; each man shall have his action.*—Ld. Raym. 938; 5 Rep. 72; Coke Litt. 56a; 81 Ky. 171; Cooley on Torts, p. 102, top.
- IV.—*The remedy at law in such cases is not plain, adequate and complete, and equity will interfere.*—40 N. Y. 19; 8 L. R. Ch. App. 125; Woods Nuis., § 794 and cases cited.
- V.—*The reconstruction of the powder mill and magazine, after the explosions thereat, and with the knowledge of the appellee, does not estop appellee; for the latter protested and actually tried to induce the abandonment of the old site.*

DENT, JUDGE:

The Huntington & Kenova Land Development Company filed its bill in chancery in the Circuit Court of Wayne county at the December Rules, 1892, against the Phoenix Powder Manufacturing Company, for the purpose of perpetually enjoining the works of the defendant as a nuisance.

The allegations of the bill are in substance as follows, to wit: That the plaintiff is a corporation for the purpose of laying out towns and selling lots therein, and doing and engaging in all manner of manufacturing and developing business of all kinds; that it owns about two thousand acres of valuable lands lying in the counties of Wayne and Cabell,

along the Ohio river, between the city of Huntington and the towns of Kenova and Ceredo; that the greater part of this land has been laid off into lots, a large proportion thereof sold, and numerous manufactories in full operation thereon; that the defendant is the owner of about fifty acres of land, on which it has an extensive plant for the manufacture of powder, dynamite, and other explosive substances, and is engaged in the manufacture of the same, and keeps stores of such substances in large quantities continually on hand, thereby creating a dangerous and threatening nuisance, which is surrounded on three sides by plaintiff's land aforesaid, and especially that portion of it which has been laid off into a proposed town to be known as the "Town of Kellogg;" that by reason thereof, a large portion of plaintiff's lands had been rendered valueless for the purpose for which they were purchased, and can not be used in safety, even for the purpose of farming, and are thereby greatly diminished and decreased in value, and are undesirable and unsalable.

Defendant answered, admitting most of plaintiff's allegations, but denied that its works were a dangerous nuisance or had to any extent materially diminished the value of plaintiff's lands; that it had been induced to purchase the land and locate its works thereon by the original incorporators and principal stockholders of the plaintiff, immediately prior to its incorporation, for the prospective benefit of the plaintiff and to increase the value of its property and boom it on the market; that the plaintiff had used it for that purpose in its original prospectus and advertisements, and now that its boom had collapsed, it was endeavoring to shoulder the blame on to the defendant; that its plant has cost it at least two hundred and fifty thousand dollars, and it has built up an extensive and profitable business, and now to destroy it would produce irreparable loss, and be inequitable, especially, to do so at the instance of the plaintiff.

On a final hearing of the case the Circuit Court granted a perpetual injunction, and from its decree the defendant appeals.

There are virtually two questions presented for the consideration and determination of this Court.

First. Are the defendant's works a dangerous nuisance *per se*?

Second. Is the plaintiff in a position to invoke the aid of a court of equity for their abatement? The first of these questions has been answered in the affirmative upon about the same facts in the case of *Wilson v. Same* (decided at this term of the Court) 40 W. Va. 413 (21 S. E. Rep. 1035.) The first clause of the first point of the syllabus is as follows, to wit: "A mill, manufacturing powder and other explosives, and storing the same on the premises situate on the bank of the Ohio river and near two railroads and a public road is a public nuisance." Judge Brannon in his able opinion elaborately discusses the question, and arrives at a conclusion which is sustained by reason and authority and was fully concurred in by the Court, and it becomes unnecessary to repeat what has been so exhaustively treated in that case here. That the defendant's immense works were a dangerous and threatening nuisance is established beyond controversy or doubt.

The second proposition is not so easily disposed of, as it presents a question of equitable interference of the gravest character and highest importance. It is plain from the evidence that the original promoters, landowners, and now the principal stockholders and officers of the plaintiff, for the benefit of the plaintiff in enhancing its lands and rendering them salable, induced the defendant to purchase the land of them and locate its works at the present place. This it did at an immense cost, and the works as they now stand are estimated at over two hundred and fifty thousand dollars in value. Afterwards it is discovered that instead of the defendant's works being an advantage to, they actually diminish and almost totally destroy the value of a large portion of its lands for the purpose for which purchased, and the plaintiff becomes as anxious to rid itself of the defendant as before its original promoters and many of its stockholders and officers were anxious to have it come and locate in their midst; that is, including its immediate predecessor, the Continental Powder Manufacturing Company, from whom defendant derives its title.

When the plaintiff found out the injury the defendant's works were to its land, it endeavored to get the defendant to move them to another point, and as an inducement, offered to take the land at ten thousand dollars, give a note for ten thousand dollars, and five hundred acres of land, and put in a switch. The defendant declined this offer, for the reason, as claimed, the offer would be nothing in comparison with the loss from removal. Those representing plaintiff then notified defendant that "we propose to have you go up in the valley, if not by fair means, by foul." There is some little attempt in the evidence on behalf of plaintiff to show that the agents of the defendant misrepresented the dangerous character of its works, but there is no allegations in the pleadings to this effect, and the evidence on the subject is at least a stand-off. The promoters of plaintiff, being men of wide business experience, were certainly aware of the dangerous nature of powder and dynamite, although not acquainted with the manner of their manufacture.

Plaintiff, failing to make an offer sufficient to justify defendant to remove, instituted this suit in furtherance of the threat to use fair or foul means. The defendant has indicated its willingness to move, provided it receive a sufficient consideration to cover the loss occasioned thereby. There is no evidence to show what this loss would be, other than it would be greatly in excess of the offer submitted by the plaintiff. This offer is not claimed to have been, nor is there any proof to show that it would be, an ample indemnity to the defendant, but counsel insist that it was a mere proffer of charity. If the evidence had shown that the amount offered was a sufficient indemnity to defendant, and was made and continued for that purpose, plaintiff would have had a much surer standing in a court of equity. But, from the pleadings and evidence in this case, the only question in controversy is as to which of the parties to this suit should bear the expense of the removal of defendant's works to a more suitable location, and this is still narrowed down to the difference between the proffer made and the actual expense of the removal; and because the defendant will not make the re-

moval unless this expense is secured to it, plaintiff seeks the assistance of a court of equity. A "fair means" to have otherwise accomplished its purpose would have been to have assumed this expense.

Defendant was sold the land and granted the privilege of constructing its works by those under whom plaintiff claims, for plaintiff's benefit, and did so construct its works, and has not enlarged them beyond the original intention as understood by plaintiff, as is shown by its prospectus. *Bankart v. Houghton*, 27 Beav. 425. Defendant has suffered serious losses by several explosions through the negligence of its employes or the interference of others. Its damages have not been less than those of plaintiff from these accidents, while its expenses for rebuilding and repairs have been very great, and for these reasons, plaintiff asks the entire destruction of its works, without recompense. Is this equity? Should the plaintiff, a speculative corporation, be permitted to induce various kinds of manufacturers to purchase of its lands, make great outlays in creating plants, and then because plaintiff ascertains that any such manufactory is an injury to the sale of others of its lands, is it to have the privilege of calling upon a court of equity to destroy the property and investment of those who have been induced to purchase of it in good faith, and without any attempt to deceive it as to the character of the manufactory to be established? Plaintiff says, "I was mistaken." Equity says: "Make good the loss the defendant will incur, and you will be relieved of its obnoxious presence; otherwise, you must bear it as a burden of your own assuming. At least, a court of equity will not lend you its assistance under such circumstances. If you would be heard, come with clean hands and a righteous cause."

A person who licenses, permits, or acquiesces in the establishment of a costly and expensive nuisance can not invoke the aid of a court of equity, even though it prove more annoying and injurious than he anticipated, but he will be left to his remedy at law, if any. If he can not sue at law, neither can he sue in equity. 16 Am. & Eng. Enc. Law 960; 2 Wood Nuis. §§ 785, 804, 805, 806; *Hulme v. Shreve*, 4 N. J. Eq. 116.

"A person may so encourage another in the erection of a nuisance as not only to be deprived of the right of equitable relief, but also to give the adverse party an equity to restrain him from recovering damages at law for such nuisance."

Williams v. Earl of Jersey, 1 Craig & P. 91; *Carlisle v. Cooper*, 21 N. J. Eq. 576; *Eden Inj.* 274; *High. Inj.* § 756; *Whitney v. Railway Co.*, 11 Gray 359; *Swain v. Seamens*, 9 Wall 254.

For the foregoing reasons, the decree complained of is reversed, injunction dissolved, and bill dismissed.

JUNE TERM, 1895.

WHEELING.

STATE v. COBBS.

Submitted June 11, 1895—Decided June 19, 1895.

1. INSTRUCTIONS—MURDER IN FIRST DEGREE—JURY.

It is not error for a court to omit to instruct a jury that it may punish murder in the first degree with either death or confinement in the penitentiary, unless asked to do so.

2. INSTRUCTIONS—JURY.

It is error to refuse to do so when asked, though not asked until the jury announced its verdict, but before its discharge.

3. INSTRUCTIONS—TIME FOR INSTRUCTIONS—RULE OF COURT.

The law does not fix any time for instructions. The court may fix it by rule.

4. JURY—VERDICT.

A court may, for good reason, return a jury to its room to further consider and amend or alter its verdict, at any time before a verdict is received by the court and the jury discharged.

5. INSTRUCTIONS—SPECIFIC INSTRUCTIONS.

A court, though asked, is not bound to instruct a jury generally as to the law of the case. Instructions as to the specific law points ought to be asked. A court may, without request, if it think the interest of justice and a fair trial call for it, instruct the jury in matter of law, the instruction being sound in law and relevant to the evidence; but it is not bound to do so unless asked; but, if asked to give such proper specific instructions, it must do so.

6. INSTRUCTIONS—TIME FOR INSTRUCTIONS—WAIVER.

The court suggests privately to counsel of prisoner the prudence of instructing the jury of its power to punish murder in the first degree either with death or by confinement in the penitentiary, and counsel says that he prefers to take chances rather than call the jury's attention to that law at that time. This does not estop the prisoner from asking such instruction later, even after the jury has announced a verdict of murder in the first degree, but before it is received or the jury discharged.

40	718
45	703
40	718
47	289
47	272
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e 51	239
40	718
58	20
40	718
63	363

7. JURORS—VERDICT—AFFIDAVIT OF JURORS.

Affidavit of jurors that they were ignorant of the law that it is with a jury to say whether murder in the first degree shall be punished with death or confinement in the penitentiary can not be read to impeach the verdict.

8. JURORS—VERDICT—AFFIDAVIT OF JURORS.

As a general rule, affidavits of jurors to impeach their verdict can not be read.

J. W. HALE for plaintiff in error, cited Code, c. 159, s. 19; 2 Thomp. Trials, pp. 1559, 1561, 1693; Sacket Instr. (2d Ed.) § 5; 9 Leigh 678, 681; 4 Leigh 745; 35 W. Va. 81; 14 Gratt. 613, 630, 632, 633; 6 Gratt. 219; 31 W. Va. 390; 19 Gratt. 813; 1 Bish. Cr. Prac. § 1003.

ATTORNEY-GENERAL T. S. RILEY for the State, cited 7 Ired. 251; 4 Gratt. 425; 31 W. Va. 370; 20 W. Va. 214; Id. 32; 39 W. Va. 427; 38 W. Va. 563.

BRANNON, JUDGE:

Peter Cobbs was sentenced to be hanged, for the murder of David Adams, by the Criminal Court of Mercer county, and then applied to the Circuit Court of that county for writ of error, which was refused, and then he obtained a writ of error from this Court.

It is said that the Criminal Court erred in failing, on its own motion, without request, to instruct the jury that if they should find the prisoner guilty of murder in the first degree, they could either find that he be sent to the penitentiary for life or punished with death.

Under the criminal practice in Virginia, and also in West Virginia, until the Code of 1868, when a person was charged with felony, the procedure of the trial began with a formal arraignment, proclamation by the sheriff and charge by the clerk. The charge of the clerk instructed the jury what they should do under the law in case they found the defendant guilty, as, for instance, what punishment they should impose, where the manner and degree of punishment were committed to them by law. This charge was under the eye of the court, was considered as an instruction by the court, and if erroneous, was ground for reversal. See its form, 3.

Rob. Prac. (old) 175. See *Allen's Case*, 2 Leigh 727. Our Code, s. 2, c. 159, abolishes such arraignment, sheriff's proclamation, and clerk's charge.

I think that the duty of informing a jury as to its power to elect between punishment by death or confinement in the penitentiary in murder cases would have been part of the clerk's charge under the former practice, and that its omission would be error, if that practice still prevailed; but such practice having been dispensed with, this matter is, like any other matter of law touching the trial, the subject of instruction, and governed by the law relating to instructions. I do not think that this power of election between the two punishments has anything about it so peculiar as to distinguish it from other rights of the defendant under the law, so as to make it incumbent on the court to give an instruction of its own motion, and render its omission error. A court is not bound, even on motion, to instruct the jury generally on the law of the case. *Womack v. Circle*, 29 Gratt. 192, par. 8. Then why so as to this matter? 2 Thomp. Trials, § 2188, does say that in criminal cases it is the duty of the judge to advise the jury as to the punishment which the law imposes on the crime, so they may properly assess the penalty according to the magnitude and character of the crime, and cautiously adds, "And it is supposed that a failure to do this, even where not requested, would, in most jurisdictions, be ground of reversing the judgment." Doubtless the advice here given by Judge Thompson to courts to see that juries do not act in the vital matter of punishment in obscurity and confusion of mind is judicious in all jurisdictions, and doubtless its observance is essential and indispensable in all jurisdictions, as in England and many of the American states, where the judge "sums up" the case, as it is said, that is, delivers a charge, in which he covers the whole ground of the case, giving his opinion on law and fact; and this charge is necessary, and must be full in its exposition of the law of the case. 1 Bish. Cr. Pr. §§ 976, 979, 980; Whart. Cr. Pl. §§ 709, 711. This charge is a material part of the trial. But in the Virginias this "summing up" or charge is unknown. Our practice is widely different. Under our practice the

judge must not state the evidence, or discuss or give or intimate his opinion upon it. If anything drops from him, even casually or inadvertently, in giving instructions or otherwise, indicating an opinion on the weight or effect of the evidence or the credibility of a witness, it is generally ground for reversal. *Dejarnette's Case*, 75 Va. 867; *Whitelaw's Ex'r v. Whitelaw*, 83 Va. 40 (1 S. E. Rep. 407); *State v. Hurst*, 11 W. Va. 54; *State v. Thompson*, 21 W. Va. 741; *State v. Greer*, 22 W. Va. 800; *State v. Sutfin*, *Id.* 771. Thus, in this state, no duty rests on the judge to instruct on the general features of the case, law or fact. I have said that the matter of instructing as to punishment falls under the law of instructions. Under that, it was not the duty of the judge, unasked, to give the instruction. We are not discussing the question whether it is error for a judge, without request by either side, to give instructions, as in *Gwatkin's Case*, 4 Leigh 678. I do not doubt that as held in *Blunt's Case*, 4 Leigh 689, the court may properly instruct the jury on a question of law, when, in its opinion, justice requires such interposition, though it be not asked by either party. But the question in point now is whether a court is bound, without request of specific instructions, to give them. It is clearly not so under our practice. *Dejarnett's Case*, 75 Va. 877; *Rosenbaums v. Weeden*, 18 Gratt. 785; 4 Minor 747; *State v. Caddle*, 35 W. Va. 73 (12 S. E. Rep. 1098). The cases of *Kitty v. Fitzhugh*, 4 Rand. (Va.) 600; *Brooke v. Young*, 3 Rand. (Va.) 106, and *Womack v. Circle*, 20 Gratt. 192, holding that a party must ask instructions on specific points, and that even when asked the court is not bound to instruct generally on the law of the case, logically negative the claim that it is error for a court not to instruct when not asked. The party must ask specific instructions.

But this does not end or settle the prisoner's right touching this matter; for, when the jury came in with a simple verdict of guilty of murder in the first degree, without any finding that he be punished by confinement in the penitentiary, he asked the court to tell the jury that it had a right to make such addition to its verdict, which the court refused to do. This solicited instruction certainly propounded the law

correctly. It is a matter of clear and important right that a party has right to ask a proper instruction, and have it given, and it is error to refuse it. *Wheeling Bridge Co. v. Wheeling & B. Bridge Co.*, 34 W. Va. 155 (11 S. E. Rep. 1009). Here is an instruction asked, properly stating the law, vitally important to the defendant, as on it perhaps hung his life, refused. This is all you can make out of it, so far, and its refusal is error, unless, under the circumstances, it can be justified. Strong reason is called for, in the very nature of the case, to warrant this refusal. The attorney-general says it was asked too late. It was not asked, as would have been proper, before the retirement of the jury; but when the jury came into court, and after its verdict had, by direction of the court, been read aloud, but before it was received by the court, while the jury was still present, and before its discharge, the instruction was asked. The object of the law was to give a fair trial. The law does not absolutely fix any time for giving instructions. *Gwatkin's Case*, 9 Leigh. 678. *Gibson's Case*, 2 Va. Cas. 70, holds that not until the court has received for record the verdict is it perfected, and until then it may be amended. I think while the jury is present and before discharge, the verdict may be amended. So held in *Sledd's Case*, 19 Gratt. 813. Where is the sound reason against giving a jury a simple, isolated instruction upon a single point, as here proposed, in a matter so vital to the prisoner, and sending them back to their chamber? The court virtually gave an instruction to, and sent the jury back, and they amended their verdict, in *State v. Davis*, 31 W. Va. 390 (7 S. E. Rep. 24.) After such instruction the jury should be sent again to their room for further consideration. I know that in *Jarrett v. Stevens*, 36 W. Va. 445 (15 S. E. Rep. 117) and *Tully v. Despard*, 31 W. Va. 973 (6 S. E. Rep. 927) where instructions have been submitted after the retirement of the jury, and refused because offered too late, this Court held that it would not for that cause reverse, unless it affirmatively appears that the court manifestly abused the large discretion vested in it in such case. This leaves to the appellate court considerable discretion. Abuse of discretion as used in those cases, does not only mean corrupt ac-

tion, but misuse or erroneous exercise of that discretion. It seems to us that in the case in hand is a plain instance of one calling for reversal. Here is an instruction asked, unquestionably correct in law, upon a statutory provision, and upon a single proposition admitting of no two adverse opinions, calling for no qualifying instruction or further argument of counsel, working no surprise to the state, doing it no shadow of injustice or harm, tending to promote and not to hinder a fair trial, and so vital to the prisoner that upon it possibly depended his life. If we do at all review the exercise of the discretion by the Criminal Court, we must say that we see no adequate reason for the refusal of the request. This is not a civil case, like the cases above referred to, but one involving life, and a discretion in such a matter in both courts should lean in favor of the accused. It does not appear that any fixed court rule prescribed the time when the instructions should be asked, and even if there was such a rule, the peculiar circumstances of this case would call for a departure from it. *Organ Co. v. House*, 25 W. Va. 64. The nature of the instruction asked—its peculiar nature—rendered it proper at any time before the jury's discharge, if asked.

Three jurors, by affidavit, say that they thought that if the jury found a verdict of murder in the first degree it was with the court to determine whether the accused should suffer death or be confined for life in the penitentiary, and not their duty to determine that matter, and that if they had known it was the province of the jury to determine between those two punishments they would have found in favor of punishment by confinement in the penitentiary, and that thus they acted in mistake of law, while three other jurors, by affidavit, say that the right of the jury to elect between the two modes of punishment was fully discussed, asserted, and explained in the jury room, before all the jurors, and that it was explained there that under the verdict found the prisoner would suffer death. Here is a strange contradiction. It is almost inconceivable that it should exist. It is a signal illustration of the wisdom of the rule of law that the evidence of jurors shall not be received to impeach their verdict. If the first affidavit

is read, it makes a strong case for the exercise of the power of the court to grant a new trial. Can it be read? I do not think these affidavits on either side can be read—not to impeach the verdict by showing ignorance or mistake of law. *Harnsbarger v. Kinney*, 6 Gratt. 287; *Bank v. Waddill*, 31 Gratt. 469; *Reynolds v. Tomkins*, 23 W. Va. 229; *Probst v. Braeunlich*, 24 W. Va. 356. If jurors can be thus allowed to overthrow their verdict, what verdict might not be overthrown? How wide open would be the door to tampering with and bribing jurors? Is every single juror to be allowed to say he misunderstood the law? Though affidavits of jurors will not be received to impeach their verdict, they are received to support it to a very limited extent only where facts come to the attention of the court, *prima facie* invalidating the verdict, which is not the case here. *State v. Harrison*, 36 W. Va. 729 (15 S. E. Rep. 982.) There may be instances of hardship under the rule, but public policy favors the rule, and it can not regard individual instances of hardship. The rule is thus broadly stated in 2 Thomp. Trials, § 2618, and is fully sustained by authority cited: "Upon grounds of public policy courts have almost universally agreed upon the rule that no affidavit, deposition, or other sworn statement of a juror will be received to impeach the verdict, to explain it, to show on what grounds it was rendered, to show mistake in it, or that they misunderstood the charge of the court, or that they otherwise mistook the law, or the result of their finding, or that they agreed on their verdict by average or by lot." See many authorities collected in 5 L. R. A. 523, to case of *Bartlett v. Patton*, 33 W. Va. 71 (10 S. E. Rep).

Another circumstance may be summoned to sustain the action of the court, namely: Counsel agreed not to argue the case, but to state what they conceived to be the law of the case, and, nothing having been said by counsel on either side as to the right of the jury to find for punishment by confinement in the penitentiary, the court called counsel for the prisoner to his desk before the jury retired, and called his attention to that fact, and the counsel remarked to the court that he would rather take chances than call the jury's attention to that law at that time. This was a private con-

versation between the judge and the counsel, practically not in the presence of the prisoner, and not heard by him, and it was qualified as to time. Is it a waiver by him? Is it an estoppel against his right afterwards to ask the court to tell the jury as to their right to impose either punishment? I do not think counsel's authority to bind the prisoner would be carried by a court so far. Not a whisper had been made by judge or counsel about this right of the jury to impose either punishment, which I think prudence suggests should be done by the court, and it would be very, very rigid to say that because the counsel, without the prisoner's knowledge, took this lottery of chance, when it failed, the prisoner would be inexorably bound by it in a matter of life and death. A court need not, unless asked, give instructions. A prisoner may undoubtedly waive them; but he has a right to ask them. Here it is not a question of waiver, but it is a question of whether he could, before it was too late, ask a proper instruction, or whether his counsel could for him recant the waiver which he had privately made. I think he could have retracted it had he known of it or made it himself.

The point that there was a separation of the jury arising from the manner in which they were kept over night is made by counsel, but not urged. There was no legal separation. There is nothing of importance or novelty in this case upon this question, which has been so much discussed in former cases, calling for further discussion. *Tompson's Case* 8 Gratt. 637; *State v. Harrison*, 36 W. Va. 729 (15 S. E. Rep. 982); *State v. Belknap*, 39 W. Va. 427 (19 S. E. Rep. 507).

Reversed and remanded for new trial.

• WHEELING.

STATE v. FLESHMAN.

40	726
49	279

Submitted June 11, 1895—Decided June 21, 1895.

1. FORGERY—INDICTMENT—VARIANCE.

While in an indictment for forgery it is unnecessary to set forth a copy or fac simile of the instrument forged, yet if this is done, and there is a material variance between the copy so set out and the paper offered in evidence, such paper, on motion of the accused, should be excluded from the consideration of the jury.

2. FORGERY—INDICTMENT—VARIANCE.

When the alleged forged note is set out in *haec verba*, and in the body thereof are the words "with 6 per cent. int. from date," and the note offered in evidence contains no such words, this is a variance, both in substance and legal effect, fatal to the introduction of such last mentioned note as evidence in support of the allegations of the indictment.

ROWAN & BOGGESS for plaintiff in error, cited 11 W. Va. 727; 17 Gratt. 629; 7 W. Va. 447; 27 W. Va. 511; Id. 22; 36 W. Va. 778; 19 W. Va. 328; 12 Bush. 342; 13 Bush. 267; 8 Am. & Eng. Enc. Law 500, 502; 33 W. Va. 455; 4 Am. & Eng. Enc. Law 738; 20 W. Va. 755; 1 Am. & Eng. Enc. Law 949; 16 Am. & Eng. Enc. Law 526, 528; Thomp. Trials, § 963; 65 Wis. 323; 26 W. Va. 143; 29 Gratt. 255; 31 Gratt. 855; 20 W. Va. 41, 755; 8 Am. & Eng. Enc. Law 513; 10 Neb. 590; 54 Ind. 168; 65 Ind. 86; 27 Gratt. 934; 39 W. Va. 659.

ATTORNEY-GENERAL T. S. RILEY for the state, cited 36 W. Va. 147, 729; 23 W. Va. 805; 37 W. Va. 812; 114 Mass. 312; 31 W. Va. 491, 501; 40 W. Va. 1.

HOLT, JUDGE:

R. R. Fleshman was convicted of forgery at the March term, 1895, of the Circuit Court of Monroe county, and sentenced to two years' confinement in the penitentiary. On writ of error, he now relies upon six separate alleged errors committed by the trial court.

First. The demurrer to the indictment, for the reason that it was too general, and did not specify the particular part of the note forged. This was not necessary. 8 Am. & Eng. Enc. Law 500, 502. A forged note, being false in one material part or signature, is false *in toto*, and must be so regarded as to the person against whom the fraud is aimed.

Second and third. The forgery in this case consisted in representing the signature of one John Fleshman to be the signature of another person of the same name, with fraudulent intent. 8 Am. & Eng. Enc. Law 464, 467; *State v. Dennett*, 19 La. Ann. 395; *Pennsylvania v. Misner*, Add. 44; *Com. v. Foster*, 114 Mass. 312. Such being the case the venue of the crime was properly proven, and the evidence of Charles A. Brown as to the conduct and representation of the accused properly admitted.

Fourth. In both counts of the indictment the note alleged to have been forged is set out in *haec verba*, as follows, to wit: "\$250.00. Six months after date, we promise to pay Charles A. Brown two hundred and fifty dollars, for value received, with 6 per cent. int. from date. This Decr. 17th, 1892. R. R. Fleshman. (Seal.) Allen Fleshman. (Seal.) John Fleshman. (Seal.)" It was unnecessary under section 6, chapter 158 of the Code, to do so, but only to describe the note as in an indictment for larceny; but, being set out, it must be proved as alleged. A material variance between the *allegata* and *probata* on the trial of an indictment for larceny is fatal. 12 Am. & Eng. Enc. Law 865. And it must be equally so in trials for forgery. The note offered in evidence corresponds in all respects with the note set out in the indictment, except the latter contains the additional words "with 6 per cent. int. from date." These words materially change the substance and the legal effect of the notes, and it is a matter of impossibility to reconcile this difference, and pronounce them to be identically the same note. The accused having objected to the admission of the evidence, it should have been excluded. 8 Am. & Eng. Enc. Law 517; *State v. Fay*, 65 Mo. 490.

This being plain and prejudicial error, it becomes unne-

essary to decide the other two assignments, to wit, the refusal to grant a continuance, and the misbehavior of the counsel in the argument of the case, as the errors committed, if such, can be avoided on retrial. Suffice it to say, that a reasonable opportunity should be afforded the accused to obtain his witnesses, and prepare for trial, and counsel in argument should be required to confine themselves to the facts in evidence before the jury.

For the error aforesaid, the judgment is reversed, the verdict set aside, and a new trial awarded, and the case is remanded for further proceedings in accordance with law.

FALL-SPECIAL TERM, 1895.

CHARLESTON.

BENTLEY v. STANDARD FIRE INSURANCE Co.

Submitted June 6, 1895—Decided November 9, 1895.

1. INSURANCE POLICY—ASSIGNMENT OF CHOSE IN ACTION—ACTION BY ASSIGNEE.

If a promissory note or other chose in action calling for money be assigned, and the party liable therefor promise its payment to the assignee, such assignee may sue on it at law in his own name, without statutory authority, as he has legal title thereto; whereas, without such promise, he would take only equitable title, the legal title remaining in assignor.

2. INSURANCE POLICY—ASSIGNMENT BEFORE LOSS—ACTION BY ASSIGNEE—ASSENT OF INSURER

If, therefore, the insured, before loss by fire under a policy of insurance, assign the right to damages in case of loss, and the insurer consents to the assignment, the assignee may, in his own name, as holding legal title, recover such damages after loss; and a reassignment to the insured party after loss, not assented to by the insurer, would not divest the assignee of his legal title, so as to prevent recovery in the name of the first assignee.

3. ASSIGNMENT OF CHOSE IN ACTION—TITLE OF ASSIGNEE—ACTION BY ASSIGNEE.

A simple assignment of a chose vests in the assignee only equitable title, the legal title remaining in the assignor, and under section 14, chapter 99, Code, the assignee may sue in his own name, or he may sue in the name of the assignor for his, the assignee's, use. Though advisable to declare in the declaration and summons that the assignor sues for the use of the assignee, omission to do so is immaterial, as the declaration of such use is no part of the pleading.

4. INSURANCE POLICY—ASSENT OF INSURER—ASSIGNMENT BEFORE LOSS.

Where a policy of insurance provides that it shall be void if assigned without the insurer's consent, the clause applies to assignment before loss of the claim for damages in case of loss.

40	739
41	449

40	729
44	602
45	184
40	729
55	270

40	729
63	365

40	729
165	196

5. ASSIGNMENT OF CHOSE IN ACTION—INTENTION OF PARTIES—ORAL ASSIGNMENT.

No formal words are necessary to make an assignment of a chose in action. Anything showing an intent to assign on the one side, and an intent to receive on the other, will operate as an assignment. It need not be in writing.

6. INSURANCE POLICY—ASSIGNMENT TO MORTGAGEE—RECOVERY BY ASSIGNEE.

A policy of fire insurance covers several properties, and a mortgage given by its holder covers only some of these properties. An assignment to the mortgagee, as such, of all the right, title, and advantage of the policy holder under it, will entitle him to recover all the loss money for all the properties.

7. ASSIGNMENT OF CHOSE IN ACTION—COLLATERAL SECURITY—RECOVERY BY ASSIGNEE.

An assignment of a chose as collateral security for a debt will enable the assignee to recover from the debtor the whole liability under it, though, as between assignor and assignee, part of it may belong, after the recovery, to the assignor.

8. INSURANCE POLICY—AMENDED DECLARATION.

In an action on a policy of insurance for loss by fire claiming a certain sum as damage, or for loss to certain property, an amended declaration may be filed claiming larger damages, or on additional property, under the same policy, by the same fire.

9. INSURANCE POLICY—AMENDED DECLARATION—LIMITATION OF ACTION.

When such amendment is made, the time as to the larger claim made by the amendment, whether under the statute of limitations or under a clause of the policy fixing a limitation for action under it, will stop running at the commencement of the suit, and not continue to the filing of the amended declaration.

10. INSURANCE POLICY—AMOUNT OF RECOVERY—PROOFS OF LOSS.

In an action on a policy of fire insurance the plaintiff is not limited in recovery by the amount of loss specified in the proofs of loss, in absence of fraud.

11. INSURANCE POLICY—*Assumpsit*—COMMON COUNTS.

In an action of *assumpsit* on an insurance policy for recovery for loss by fire, there may be included in the declaration, with a count under section 61, chapter 125, Code, the common counts or other counts proper in that form of action.

12. INSTRUCTIONS—ASSUMPTION OF FACTS—WEIGHT OF EVIDENCE.

An instruction should not assume a fact as not proven when there is any evidence tending in an appreciable, though slight, degree, to establish it. An instruction should not pass on the weight of evidence.

13. INSTRUCTIONS—SPECIAL QUESTIONS.

A special question should not be submitted to a jury, if immaterial.

W. P. HUBBARD for plaintiff in error cited Code, c. 99, s. 14; 14 Gratt. 44-45; 13 W. Va. 718; 20 W. Va. 498, 510; 50 N. H. 297; 57 Hun. 589; 12 Ins. Law Journ. 417-421; 22 Id. 358; 10 W. Va. 522; 21 W. Va. 368, 576, 579, 594; 28 W. Va. 591; 30 W. Va. 797; 104 U. S. 779; 86 Va. 512; 2 May Ins. (3d Ed.) 459a; 144 U. S. 624; 37 W. Va. 789; Const. Art. VIII, s. 5; 37 W. Va. 116; 16 Pet. 494, 505; 9 Vroom (N. J.) 140, 143; Flands. Ins. 442; 38 Cal. 544; 55 N. H. 457; 30 Cal. 78; 25 N. H. 289; Code, c. 19, s. 14; 139 Mass. 57; 10 Allen 213; 1 Bosw. 507; 25 W. Va. 624, 628, syl. pt. 15; 31 W. Va. 851, 854; Code, c. 125, ss. 11, 12, 61, 62, 64, 65; 24 W. Va. 206; 117 Pa. St. 94; 77 Mich. 231; 11 S. W. Rep. 12; 45 Mo. 562; 27 Mich. 138; 35 Mich. 227; 16 S. W. Rep. 174; 107 N. C. 724; 34 W. Va. 252; 41 Fed. Rep. 744; 1 Chit. Pl. 200; 39 W. Va. 672; Code, c. 130, ss. 46, 64, 66; 39 W. Va. 732; 18 W. Va. 400; 1 Chit. Pl. 213.

T. J. HUGUS for defendant in error, cited 6 W. Va. 336; 24 W. Va. 206; 28 W. Va. 653; 34 W. Va. 252; 106 Pa. St. 28-34; 52 N. W. Rep. 588-590; 34 P. Rep. 1059-1076; 37 W. Va. 789, 795.

CALDWELL & CALDWELL for defendant in error, among other points and authorities, submitted the following:

1.—*The consent of the insurance company to the assignment to Bentley made on the face of the policy, was equivalent to a promise by the insurance company to pay Bentley.*—2 May on Ins. (3d. Ed.) §§ 446, 378; 2 Wood on Ins. (2d. Ed.) § 514; 1 Jones on Mortgages § 407; 124 Mass. 132; 5 R. I. 394, 399.

If this new promise and contract was assigned to Louth after the fire by Bentley, Louth could sue in Bentley's name as assignor.—14 Gratt. 45, 46; Id. 2, 13.

It would not be necessary to state in the record that suit was brought for the use of Louth.—14 Gratt. 46.

The verdict of the jury is conclusive.—2d McLean, 261; 8 W. Va. 553; 23 Gratt. 619; 29 W. Va. 529; 34 W. Va. 774; 12 W. Va. 116.

Motion to set aside a verdict is same as demurrer to evidence.—34 W. Va. 43.

Inferences most favorable to the demurree will be made in cases of grave doubt.—8 W. Va. 515, 3rd pt. of syllabus.

Even in construing the evidence of a single witness.—10 Leigh 164; 34 W. Va. 43; 37 W. Va. 796; 37 W. Va. 287.

II.—*Bentley, the plaintiff, could recover for loss by the fire upon property not included in his mortgage.*

It is true that the insured must have an insurable interest, but no insurable interest is necessary in the assignee.—2 May on Ins. 3d Ed., Analysis by Mr. May, bottom p. 831, also at end of § 378, middle of § 378a and § 379; Flanders on Ins., p. 443 and the notes, and p. 446 and the notes; also pp. 452, 453; 12 Wright (Pa.) 367, 373 and 374; 31 Mich. 346, 355.

Where the policy is assigned to a mortgagee as collateral security, he may recover the whole sum insured if the loss be so much.—Am. & Eng. Ency. of L. & E., vol. 7, p. 1051.

The effect is not to assign the insurance as such, but the loss fund.—Flanders on Ins., p. 443 and note, p. 446 and note, pp. 445 and 447 in text; 38 Cal. 544, 545; 12 Mass. 281.

An assignment is the same thing as an entry on the face of the policy, pay to A B. loss, if any.—Flanders on Ins., p. 442; 38 Cal. 544; 2 Wood on Ins. (2d Ed.) § 370; 2 May on Ins. (3d Ed.) end of § 378.

Louth continued to be the insured after the assignment. Bentley by the assignment only acquired a right to the loss fund, in case there was no breach of the conditions of the policy by Louth.—2 Wood on Ins. (2d Ed.) § 370; 2 May on Ins. (3d Ed.) §§ 378a, 382; Flanders on Ins., p. 454, § 11.

The word mortgagee was only descriptive of the person.—7 Leigh, 604.

We could safely rest the plaintiff's right to maintain this suit as to loss on the property not included in the mortgage, upon—37 W. Va. 789.

The party to whom loss is made payable may sue for and recover the whole amount under the policy, holding the residue, if any, over and above his own interest, as trustee for the benefit of the owner or others interested.—1 Jones on Mortgages, § 407; 5 R. I. 394 and 399; 124 Mass. 126, 132; 77 N. Y. 600, affirming 13 Hun. 122; 23 W. Va. 276, citing 93 U. S., 527; 19 N. H. 575; 60 N. Y. 619; 5 Duer, 517; 2 Wood on Ins. § 514, pp. 1123, 1124, and § 370; 2 May on Ins., § 378; Flanders on Ins., Ed. of 1871, pp. 452, 453, 447, in note; 7 Cush. 6.

III.—*The filing of the amended declaration and amended statement was not the commencement of a new suit as to the additional items claimed therein in excess of the five hundred and twenty two dollars and twenty four cents claimed in the proofs of loss, and therefore the recovery of such additional items was not barred by the provision of the policy that all actions on the same must be brought within six months after the fire.*—34 W. Va. 252; 28 W. Va. 653; 11 S. W. Rep. 1089; 69 Iowa 350; 77 Pa. St. 441; 134 Mass. 308; 29 Maine 108; 13 Hun. 122; 77 N. Y. 600.

IV.—*The proofs of loss did not estop the plaintiff from recovering a greater amount than that claimed in them.*—1 Am. & Eng. Enc. of L. & E., bottom p. 113; Sto. Eq. Jur., § 527; 106 Pa. St. 34; 52 N. W. Rep. 548; 57 Mich. 21; 25 Mich. 471; 55 Mich. 436; 2 May on Ins. (3d Ed.) end of § 424a: 142 U. S. 699.

V.—*The Circuit Court ought to have refused to allow any of these five questions to be asked the jury, because if answered favorably to defendant they would not have clearly excluded every conclusion that would authorize a verdict for the plaintiff.*—35 W. Va. 667.

The four questions asked of the jury were all fully and properly answered, the first time the jury answered them, and again more fully, but not either more or less properly answered when the jury was compelled to answer them a second time at the instance of defendant's counsel.

When a fire has occurred the courts are very reluctant to deprive the insured of his indemnity for any failure or neglect to comply with any of the mere formal requisitions relating to recovery.—1 May on Ins. (3d Ed.) § 217; 137 N. Y. 398.

VI.—*The Circuit Court erred in favor of the defendant in the instructions. Bentley had the legal title whether he had reassigned to Louth all his interest or not, and even if the jury found that such reassignment was made, it was error for the Circuit Court to instruct them that Louth could not sue in the name of Bentley.*

VII.—*The common counts and an account stated can be properly joined with the count in statutory form on an insurance policy.*—Code, c. 125, s. 61; 9 Gratt. 183, 185; Minor's Inst., vol. 4, pt. 1, pp. 576 et seq., 941; 28 W. Va. 583.

ON REHEARING.

VIII.—*The petition for rehearing claims that: "In none of the cases cited by the Court to the effect that the insured is not bound or estopped by his proofs of loss, does it appear that by the terms of the policy contract the amount of loss was payable only after proofs of such amount were furnished."*

"As the proofs are only made to show the insurer a state of facts to enable the latter to adjust and pay the loss, if he declines to adjust, but waits a suit, the purpose for which the proofs were made is over; and therefore it has been held that innocent errors of statements in the proofs as to value of the thing destroyed may be corrected at the trial, for there is no estoppel."

—Section 1012 of 2d Biddle on Ins.; 82 Cal. 263; 31 N. Y. Sup. Ct. Rep. (24 Hun) pp. 58, 61.

The provision in the policy that the loss (meaning of course the amount of the loss) shall be paid sixty days after the proofs of the same have been furnished, has no application in a case like the one at bar, when the insurer "awaits a suit," because then "the purpose for which the proofs were made is over."—2d Biddle on Ins. § 1012.

A general refusal to pay at all will excuse defects, and is a waiver of proofs of loss.—2d Biddle on Ins., §§ 1136, 1139; 2 May on Ins. (3d Ed.) § 469.

If the insurance company fails or refuses to pay the smaller sum mentioned in the proofs of loss, it waives proofs of the larger sum constituting the actual loss, for it would be a nugatory thing to make such proofs, and the law does not require idle ceremony.—21 W. Va. 383.

If the insurance company would not pay the less sum it would not pay the greater.—52 Ill. 464.

When an amicable adjustment is refused to be made or the company refuses to pay or denies liability the above provision, that the amount of the loss shall be payable sixty days after proofs of the same are furnished has no application, for the loss becomes payable immediately.—2 May on Ins. (3d Ed.) note 1, on bottom p. 1121; 14 Mo. 220; 51 Ill. 342; 56 Tex. 366.

As above "the purpose for which the proofs were made is over," and the provisions as to proofs of loss are considered as eliminated from the policy.

"They never were a part of the contract and did not fix the liability of the insurance company, but (ordinarily) they serve to fix the time when the loss becomes payable."—39 W. Va. 672, pt. 3 of

syllabus. *When, however, the insurance company refuses to pay or denies liability as they did in this case the proofs of loss do not serve to fix the time when the loss becomes payable, for, as established by above cases, the loss becomes in such event payable immediately.*—21 W. Va. 383.

A refusal to pay and denial of liability are the same in effect.—33 W. Va. 544.

BRANNON, JUDGE :

Bentley brought a suit in the Circuit Court of Ohio county against the Standard Fire Insurance Company upon a policy of fire insurance to recover for loss by fire, recovered judgment, and the defendant sued out a writ of error.

The first question we meet with is, has the plaintiff such title to the demand he sues upon as enabled him to support the action? The policy was issued to Louth, who, before the loss, assigned it in writing upon the policy to Bentley, and the company in writing approved the assignment, and then, after the loss, Bentley, as is claimed by defendant, orally re-assigned to Louth; and the defendant contends that Louth must sue, and that Bentley can not. The defendant contends that the legal title under the policy was in Louth, as it was taken out in his name, that when he assigned to Bentley, Bentley took not legal, but only equitable title, and when Bentley reassigned to Louth, Bentley was divested of the only title he ever had, which was but an equitable title, and Louth became again the holder of the full and entire title. The unreasonable rule is firmly settled that though the statute changed the common-law principle that choses in action, not negotiable, could not be assigned, and validated such assignments, and gave the assignee an action in his own name, the assignee has only equitable title, and the assignor retains legal title. *Garland v. Richeson*, 4 Rand. (Va.) 266; *Clarke v. Hogeman*, 13 W. Va. 718; 1 Tuck. Comm. 348; 4 Minor. Inst. 24; *Davis v. Miller*, 14 Gratt. 1, syllabus 6; 1 Bart. Law Prac. 236. Under this principle, if Bentley had only equitable title, Louth retaining the legal title, and if Bentley did effectually reassign that equitable title to Louth, so that it sunk or merged in Louth's legal title, Bentley could not maintain the action, because he had no title whatever on which to rest his action, then what manner of title did Bentley hold? While yet the law is that

a simple assignment of a non-negotiable instrument gives the assignee only equitable title, yet it is true that where the debtor, with notice of such assignment, promises payment to the assignee, the assignee may sue in his own name, not because of the statute which gives the assignee right of action in his own name, but because of the debtor's promise to the assignee, based on the consideration of pre-existing liability and its assignment to the assignee, giving to the assignee by such promise a legal title in place of what, until the promise, was only equitable title. 2 Rob. Prac. (New) 255, 256, and cases cited; *Cleaton v. Chambliss*, 6 Rand. (Va.) 86; *Pierce v. Insurance Co.*, 50 N. H. 297; opinion of Shaw, found in 2 May Ins. § 378, from case of *Fogg v. Insurance Co.*, 10 Cush. 337. It may be said that in such case the plaintiff has no legal title to the very note itself or other chose assigned, but only legal title under the promise made to him, and he can sue only on that promise as the gist of his action, not on the thing assigned; but, while the mind may see this distinction, it is dim and refined. It rather seems to me that when, with notice of assignment, the debtor promises to pay the assignee he plainly intends to make, and does make, the stipulation between himself and the assignee, substituting the assignee in place of the original payee, and making him a party to that very contract. It is the original contract, and its assignment, and the promise to the assignee to discharge it, which together make the contract between the promisor and the assignee. *Mowry v. Todd*, 12 Mass. 281 (side page); *Barrett v. Insurance Co.*, 7 Cush. 175. There the action was on the very note in the name of the transferee. So in *Gordon v. Downey*, 1 Gill. 41, the declaration was on the written contract, its assignment, and a promise to pay the assignee; and it was held that though the statute giving assignees of certain instruments right to sue did not cover the instrument assigned in that case, yet the assignee could maintain the action in his own name, without help from that statute, under ordinary principles of law.

In the present case the declaration counts upon the policy and its assignment, with the consent of the defendant, to Bentley; and under the principles above stated applicable to con-

tracts generally, and not merely to contracts of insurance, I think Bentley could sue in his own name, not only under the statute giving him right to sue, but independent of it; and not only that, but, what is important here, that he would have legal title.

It is not denied that Bentley could sue in his own name had he not reassigned to Louth, but it is denied that he got by assignment legal title, but got only equitable title; and when he assigned that back to Louth he could no longer sue; whereas, if he had legal title, when he reassigned, he passed only equitable title to Louth, retaining legal title, and could in my opinion, still sue under the familiar principle that though an assignee of a chose may himself sue, suit may still be in the name of the assignor. *Garland v. Richeson*, 4 Rand. (Va.) 266; *Clarke v. Hogeman*, 13 W. Va. 718. We could not say that when reassignment takes place, the right in the first assignee is divided into two parts; the mere equitable title to the chose derived under his assignment going back, and he retaining the right arising under the promise to him. All make a full-fledged legal estate in him, and reassignment carries back only an equity.

Another consideration adding strength to the position that legal title vested in Bentley: The policy itself provides that it shall be void unless consent of the company in writing be indorsed in certain cases, one being, "if this policy be assigned before loss," which is to say conversely that, if the company so consent, assignment shall be valid. It thus contemplated assignment, and was an undertaking to pay to the assured or his assignee, and, when lawfully assigned, the assignee became as if an original party to the contract. After such assignment only he could sue. *Carpenter v. Insurance Co.*, 16 Pet. 495, point 4. I am aware that it may be said that the above quoted clause against assignment does not relate to a mere assignment of the right to the insurance money, but to one where the property insured is transferred, and with it the policy. Some cases so hold. *Ellis v. Kreutzinger*, 27 Mo. 311; *Bibend v. Insurance Co.*, 30 Cal. 78; *Griffey v. Insurance Co.*, 100 N. Y. 417 (3 N. E. Rep. 309.) See 2 May Ins. § 379. I do not see the force of this doctrine. It may

be applicable to show that acts of the assured may destroy the policy notwithstanding the rights of the assignee, for it is not so far, or in all respects, a new contract with the assignee, that it is a new contract of insurance with him, and an end of the insurance with the assignor, for undoubtedly his acts may avoid the policy and deprive the assignee of right to recover; but the argument can go no further. The clause can not relate only to a transfer of the property insured, and with it an assignment of the policy, since a separation clause forbids a transfer of the property insured. The insurance company would be willing to trust to one owner not to set fire to the property, or do other things to its loss or danger, but unwilling to trust to another owner without its consent. Hence there is a clause against alienation. It might be unwilling to trust any one who would have claim to the insurance money by assignment, because a dishonest man, who had little hope to get his money from his subsequent mortgage, might burn the property to get his money. So when the assignment is not to a mortgagee, but a stranger. It seems to me that the company intended in this clause to deny the right to assign the mere claim for the damage ensuing upon loss by fire, except with its consent. So thought the court in *Ferree v. Insurance Co.*, 67 Pa. St. 373, and *Bergson v. Insurance Co.*, 38 Cal. 541, supports this view, later than the *Bibend Case*, *supra*. The courts hold such assignment to the mere claim of damage in case of loss to be valid. Then the interest of the company insuring is that right to the money shall not go where it might be an inducement to destroy the property, without any power in it to approve or disapprove the assignment. Why, then, shall we say that a broad clause against assignment was not meant by the company for its safety as well where only the right to the money is assigned as where the policy is assigned to one purchasing the property insured? This view is sustained by the text of 2 May Ins. § 380. When an assignment is made with the consent of the insurer, it operates as an agreement to pay the loss to the assignee. What else does it import? *Kingsley v. Insurance Co.*, Cush. 400. As Shaw, C. J., said in *Wilson v. Hill*, 3 Metc. (Mass.) 69, "an assignment

with consent constitutes a new and original promise to the assignee." It is like an order indorsed on policy, "Pay to B. in case of loss." Opinion in *Bergson v. Insurance Co.*, 38 Cal. 544. This accepted assignment is simply an order to pay money accepted. Who has legal title to the money of the accepted order? I see no difference between this assignment approved, by which the company agreed that the loss be paid to Bentley, and a clause in the policy itself, "Loss payable to Bentley." See *Harrington v. Insurance Co.*, 124 Mass., last words page 131; *Brown v. Insurance Co.*, 5 R. I. 394, 399. Why may we not say the assignee has legal title under such new contract? To deny it is to yield to mere technicality. "The assignment and assent to it form a new and derivative contract out of the original." 2 May Ins. § 378, bottom page 518. "A new and valid contract between insurer and assignee." 2 Rob. Prac. 302, § 5.

I conclude, therefore, that legal title remained in Bentley; and, even if he did orally assign, after the loss, to Louth, the right to collect the money, yet suit was properly brought in Bentley's name, as he held legal title, and Louth only equitable title. Bentley got legal title by assignment with the company's consent, and its promise to pay him; but there was no such consent to the reassignment, the company not being thus a party to it. This makes a difference between the assignment to Bentley and his reassignment to Louth. Suit could be in Bentley's name, though in fact prosecuted for Louth's use, without saying that it was for his use, though it is always better to declare in a declaration that the plaintiff sues for the use of another, if such is the case. Such statement is no part of the pleading. The cause of action is complete without it. Where it is so stated in the declaration or summons, it is notice to debtors to prevent payment to assignee, and judgment for costs may be given against the beneficiary. *Clarke v. Hogeman*, 13 W. Va. 718; *Clarksons v. Doddridge*, 14 Gratt. 42. I thus see no error in the ruling of the court refusing to strike out the plaintiff's evidence on the idea that he had no right to sue, or in refusing the imperative instruction that the jury must find for the defendant, or in refusing instructions 8 and 9 asked by defendant. Nor do I see error in plaintiff's instruction No. 7,

though, as to the said legal point, it goes further against the plaintiff than the law goes. It was, however, perhaps offered with reference to the assignment as a matter of fact.

Instruction No. 7: "If the jury believe from the evidence that the plaintiff is entitled to a verdict in this case, they may find in his favor, unless they believe that there was an absolute and unquestioned surrender on the part of Bentley of all his interest in the policy sued on, or its funds or proceeds, to A. W. Louth, the said policy having been before such surrender held by the plaintiff as collateral security." The question above discussed is made and elaborately argued in brief of counsel, though in fact it is not material whether the view above taken is right, because the jury made a special finding that Bentley did not assign back to Louth; and, as we can not set aside that finding, no matter what title Bentley had, legal or equitable, he could maintain the action. Leaving now the point as to the kind of title to the demand vested in Bentley, the next question presented is whether the instruction just quoted is erroneous in its use of the words "absolute and unquestioned." The evidence tended to show that Bentley owned a mortgage on Louth's property, and Louth assigned the policy to Bentley, as mortgagee, as collateral security; and after the loss by fire Bentley handed the policy to Louth, with authority to him to collect the insurance money, and with it rebuild the buildings, there being no further contract of assignment, and no consideration paid further than the promise to apply the money in rebuilding. There was evidence that in a deposition in some other suit Bentley had called it an assignment. Thus it was a controverted question whether there was an absolute assignment by Bentley to Louth, entirely divesting Bentley of all title, so that he could not sue, or whether their intent was that Bentley still retain the legal right to the money, and only made Louth his agent to collect and apply it. There was a good deal of evidence in the examination and cross-examination of Bentley and Louth as to this matter, and it was a question of fact for the jury. I think the word "absolute," under these circumstances, was meant, and would be so understood by the

jury, to tell the jury that the intent of the parties must have been to pass back to Louth from Bentley absolutely all his right under the policy, and not merely a delivery of the policy only to receive the money, and devote it to Bentley's benefit in rebuilding; a mere authority or agency to collect to rebuild, not giving Louth the money for his own use. Assignment of a chose is a sale like a sale of a chattel. There must be an intent to divest the seller of all right and title, and invest it in the assignee. No formal words are necessary. Anything which shows an intention to assign on the one side, and an intent to receive on the other, will operate as an assignment if sustained by sufficient consideration, 1 Am. & Eng. Enc. Law 835; *Tingle v. Fisher*, 20 W. Va. 497. An assignment need not be in writing, as no statute requires it. *Marcus v. Insurance Co.*, 68 N. Y. 625; *Hooker v. Bank*, 30 N. Y. 83; 2 Rob. Prac. 256, § 3. Now, as to the word "unquestioned," found in said instruction. It could not have reference in time to the trial but to the date of the reassignment of the policy from Bentley to Louth. It meant to convey that a reassignment—an actual reassignment—must have been in fact intended by the parties; that it must appear that such was their purpose, without serious question. The word was not well chosen, but before we can reverse a judgment for such a cause we ought to see that the language, under all the circumstances, misled or was calculated to mislead the jury; and we can not so see in this case. The word did not mean that that point of defense must be sustained by proof beyond doubt. And besides, in two of the instructions of the defendant, the court told the jury that if they believed from the evidence that the policy had been reassigned after the loss, the plaintiff could not recover. These instructions gave all the defendant could ask, clearly guided the jury, and there is nothing in said instruction 7 inconsistent therewith; and I do not see how any harm could possibly have come to the defendant from said instruction 7. And in fact, as there was not a particle of evidence to show any acceptance of the reassignment by the company, or any other assignment than a delivery by Bentley to Louth of the policy with power to collect in case of loss,

not as a gift or sale for Louth's use, but strictly to apply to Bentley's benefit in rebuilding, by no view could Bentley thereby be divested of his legal title; and therefore, if we say Louth had an equity, Bentley could still sue.

Another question in the case is this: The policy of insurance covered a building, manufacturing machinery in it, and stock and materials for manufacturing, while Bentley's mortgage covered only building and machinery, and not stock and materials. He recovered an amount in excess of the loss set down for the property included in his mortgage. Could he do this? Could he recover the loss for stock and materials, as well as for building and machinery? Unless we overrule *Colby v. Insurance Co.*, 37 W. Va. 789 (17 S. E. Rep. 303) we must say that such recovery was correct. There is more reason for justifying recovery beyond the property included in the mortgage in this case than in that, for two reasons: *First*. The policy in that cause, while to one person, contained the clause that the money should be payable in case of loss to "Colby, mortgagee, as his interest may appear," while this policy does not, nor does the assignment. I thought those words controlling in that case, limiting the recovery to the property covered by the mortgage. It is true, the assignment in this case assigns to "Henry Bentley, holder of mortgage, and his assigns, all my title and interest in this policy, and all advantages to be derived therefrom." True, I do not consider the words "holder of mortgage" as mere *descriptio personae*, and immaterial, certainly not as between Louth and Bentley, as, if the mortgage were paid, Bentley's right would end, and the policy stand in favor of Louth; and Bentley can claim no further than the amount of his mortgage debt unpaid, not any debt. The second reason is that had the assignment said no more than that it was to Bentley, mortgagee, it might be said we should imply the words, "as his interest in the property as mortgagee may appear;" but here the assignment is general, not limiting the right assigned by such words, preventing us from interpolating them by implication by saying that the assignment is "all my title and interest in this policy, and all advantages to

be derived therefrom." Does not this cover his whole demand for loss of all the property insured?

It is urged that as to some of the property insured Bentley had no insurable interest, as his mortgage did not cover it, and for want of such interest he can not take an assignment as to the property not included in the mortgage. It is true that to insure property against fire the party must have an insurable interest at the dates of both the policy and the loss. *Sheppard v. Insurance Co.*, 21 W. Va. 368. Bentley therefore could not take out a policy as to the stock and material, to indemnify him as a mortgagee; but he is not the insured, but the assignee of the insured; and an assignee of the mere right to money in case of loss need not have an insurable interest. If the words assigning to Bentley, "holder of mortgage," do not require interest in assignee, the law does not; and those words do not in this case, because the assignment is all of Louth's right, title, or advantage under the policy; and that language took in his right to loss from destruction of the property not covered by the mortgage.

Another question is this: The plaintiff, in his bill of particulars accompanying the original declaration, itemized the subjects of his claim, aggregating them at seven hundred and fifty dollars, and later filed an amended declaration and statement claiming the full amount for which the defendant became liable by the fire upon all the properties insured in the policy. This amendment is not a departure from the original as introducing a new cause of action. It introduces no new cause of action, but relies for claim on the same policy and same fire as the cause of action, claiming more damages for the same cause, as in the first declaration. *Clarke v. Railroad Co.*, 29 W. Va. 732 (20 S. E. Rep. 696); *Kuhn v. Brownfield*, 34 W. Va. 252 (12 S. E. Rep. 519); *Dakin v. Insurance Co.*, 77 N. Y. 600, will pointedly support this amendment. If the amended declaration do not depart from the original, any further claim it properly introduces is regarded as in from the commencement of the suit, as regards the statute of limitation; that is, the time stops running at the commencement of suit, and does not go on until the date of the filing of the amended declaration. *Kuhn v. Brownfield*, 34 W. Va.

252 (12 S. E. Rep. 519). "Where an action has been begun within time, amendment may be filed after time limited by statute setting up an additional damages arising out of the original cause of action." *Cooper v. Mills Co.*, 69 Iowa 350 (28 N. W. Rep. 632). As Bentley could recover beyond the property covered by his mortgage, this amendment, as to that, is vindicable.

There is a clause in the policy fixing a conventional period of limitation of six months. That does not alter the case, as its only effect is to shorten the period; and, if the further claim be on the same cause of action, it gets credit as to time with relation to the commencement of suit.

Another question: The proof of loss claimed the damage by fire to be a certain amount, and on the trial the plaintiff proved and recovered more. Could he do this? Is he limited to proofs of loss? Is it an estoppel as a finality upon him? 2 Bid. Ins. § 1012, states that: "As the proofs are only made to show the insurer a state of facts to enable the latter to adjust and pay the loss, if he declines to adjust, but awaits a suit, the purpose for which the proofs were made is over; and therefore it has been held that innocent errors of statements in the proofs as to the value of the thing, or cause of death, etc., may be corrected at the trial; for there is no estoppel." The cases cited by him and other cases sustain the position. *Insurance Co. v. Kepler*, 106 Pa. St. 34, says such proofs are open to explanation. The proof of loss was less than recovery, but the company declined to pay, and awaited suit. "An insured person is not estopped, by the proofs of loss, from recovering a larger amount if the insurer refused to act upon the proofs and repudiated liability." *Sibley v. Insurance Co.*, 57 Mich. 14 (23 N. W. Rep. 473). See, also, *Insurance Co. v. Kepler*, *supra*; 2 May Ins. close section 424a. *Smiley v. Insurance Co.*, 14 W. Va. 33, is authority against the theory that proofs of loss are a finality upon the insured, holding that he is not bound by the erroneous statement as to cause of fire made in his proof. That would seem a more important misstatement than one as to amount of loss. If there be no fraud, and certainly if the insurer is not injured by the undervaluation, as he is not here, why should the in-

sured be precluded from showing the truth? If Bentley at first thought he could recover only as to the property covered by his mortgage, and afterwards concluded that consistently with law he could go beyond that, here is no fraud, no estoppel upon him. The brief of counsel for plaintiff in error relies with emphasis upon *Campbell v. Insurance Co.*, 10 Allen 213; and *Irving v. Insurance Co.*, 1 Bosw. 507, holding different principles. As to the former case, Mr. Wood justly criticizes it, saying it is based on the case of *Irving v. Insurance Co.*, just mentioned, decided in the superior court of New York City, and against the great current of authority—a statement which my own examination of numerous cases fully verifies. Wood Ins. (1st Ed.) § 427. And I remark as to the case of *Irving v. Insurance Co.*, that it is not from a court of authority; and Mr. Biddle, in the second volume of his work on insurance, note 3 to section 1012, says it has been virtually overruled by the same court in *Neill v. Insurance Co.*, 42 N. Y. Super. Ct. 259, which our library does not have. And in those cases the misstatements were not as to mere amount of loss, but other facts. The United States Supreme Court, in *Association v. Sargeant*, 142 U. S. 699 (12 Sup. Ct. 332) said that “the defendant was not prejudiced by the statements and opinions contained in the proofs of death, and the plaintiff was not estopped thereby, as a matter of law.” Many such cases are to be found. At this point I notice that Justice Field dissents from those two cases in *Insurance Co. v. Newton*, 22 Wall. 36.

Another question: Defendant’s counsel objects that the amended declaration combines a declaration on an insurance policy under Code, c. 125, s. 61, with a declaration at common-law comprising common counts and an account stated. It is not a declaration for the policy and another for the money counts, but it is a declaration combining a count on the policy and a count for the money counts; a joinder of counts. It is very common to insert a special count with common counts under the commonest principles of pleading. 4 Minor Inst. 576, 941. Unless there is something peculiar in an insurance case, this is properly done here. If a party has a demand against an insurance company for loss by fire,

and a demand for service or money lent, could he not avoid multiplicity of action, and unite in one declaration the several claims as in ordinary cases? I think so. Surely, the character of the person of the defendant could not affect the general rule of pleading. Then, unless the said statute has the force to change it, this rule of pleading will sustain the declaration in this regard. That statute was meant, not to change the form of action or pleading, but only to prescribe a short form of declaration instead of the prolix, cumbrous forms of declaration which had been used upon policies of insurance, with all their stipulations, exceptions, provisos, and conditions. It simply dispensed with allegations hitherto necessary, not changing the nature of the action. The statute says that "a declaration or count on a policy of insurance" may be to a certain effect, not that a declaration only may be; thus implying that such statutory count may be only one along with others. That the statute (section 64) says that to such declaration or count the defendant may plead "that he is not liable to the plaintiff as in said declaration is alleged," whereas to the other, or money counts, *non assumpsit* and other pleas apply, does not change the case. There may be such statutory plea to the statutory count on the policy and *non assumpsit* or other plea to other counts, as is often the case where one plea goes to one count, another to another. And notice that the statute, in section 64, says that to "any declaration or count on a policy of insurance" such plea may be filed, thus allowing such plea to be limited to a particular count. In *Travis v. Insurance Co.*, 28 W. Va. 583, the plea of *non assumpsit* was held to be good to such statutory declaration, as the declaration there was held, in effect, a good statutory one, though not a good one under the common-law.

I see no error in plaintiff's instructions 1, 2 and 3. They involve no principles of law not stated above, and need not be further adverted to.

I see no objection to the following instruction for plaintiff: "(4) If the jury believe from the evidence that the assignment attached to the face of the policy was made by A. W. Louth as collateral security to the plaintiff, Henry H. Bentley,

for a mortgage debt on part of the property insured, and the assignment as written was approved by the defendant company, then the effect of such assignment was to give the plaintiff a right to recover in this action whatever sum, after a fire should occur, Louth would have been entitled to recover had no such assignment and approval been made, with interest on said sum to the date of the verdict from the time it became payable according to the terms of the policy when complied with by said Louth." Oral evidence showed that the assignment of the fund was contingent on the happening of loss, and that is that the assignment was as collateral security for a mortgage debt due Bentley from Louth; but the assignment as written was not so qualified, but was absolute. Now, the instruction meant that the assignment as written authorized a full recovery by Bentley, notwithstanding it was collateral security. That would not affect Bentley's right to recover, as that was a matter of trust between Bentley and Louth, not one concerning the insurance company. Bentley would recover the whole, and any balance after paying his debt would be in trust in his hands for Louth, at least not cognizable in this action.

Defendant's instruction 7: "There being no evidence that Shattuck, the adjuster, was authorized to act for the defendant company, whatever he may have done can not affect the rights of the defendant in this case." This was properly refused. It is assumptive of the fact that there was no evidence tending to prove Shattuck's authority, whereas there were some evidence and circumstances so tending. An instruction must not assume a fact. *Bank v. Als*, 5 W. Va. 50; *Kerr v. Lunsford*, 31 W. Va. 660 (8 S. E. Rep. 493) point 27.

Another question arises upon a special question presented by the defendant for answer by the jury. Interrogatory No. 5 the court refused to submit. It was: "Was this suit in fact brought by Louth through his attorneys, and has it been maintained by him?" What if it was? Bentley had legal title, and, if there had been an unqualified assignment back to Louth, it was an equity, and Louth could sue in Bentley's name, as stated above; and if he had a mere authority to collect, he, of course, could do so. *Clarke v. Hogeman*

13 W. Va. 718; *Clarksons v. Doddridge*, 14 Gratt. 42, 46. An answer "yes" to this interrogatory would not have defeated plaintiff, or prevented judgment on the general verdict; and thus the interrogatory was immaterial, and for that reason was properly refused. *Andrews v. Mundy*, 36 W. Va. 22 (14 S. E. Rep. 414); *Peninsular L. T. & Manuf'g Co. v. Franklin Ins. Co.*, 35 W. Va. 666 (14 S. E. Rep. 237).

To certain other interrogatories the jury at first returned answers which, while not in the categorical form of yes or no, yet substantially and plainly and sensibly answered the questions; and on objection the jury again retired and added to the former answers, as suggested by the court, answers of yes and no to the questions, respectively. I see no objection to a court's directing a jury as to form of answer in such a case. The answers, taken all together, after such addition, plainly convey the jury's meaning, and give clear and intelligent answers to the interrogatories. But, moreover, these questions and answers are immaterial. The first asked is whether the assignment by Louth to Bentley was as collateral security for the mortgage debt. What if it was? As stated above, the assignee of a debt, though it be for collateral security, can recover it absolutely in a common-law action as to the debtor, though an assignor may sue him for any surplus of the money received by him after payment of the debt. Colbrooke Collat. Sec. § 447.

The other interrogatories, 2, 3 and 4, if answered favorably to the defendant, would at most only establish the reassignment back from Bentley to Louth, and, notwithstanding that, Bentley could still maintain, or Louth as active prosecutor could still maintain in Bentley's name, the present suit.

On familiar principles of law, without detailing evidence, which would answer no legal purpose, we can not set aside the verdict as contrary to or unsustained by the evidence. Affirmed.

ON RE-ARGUMENT.

Since the filing of the above opinion a petition for rehearing suggests that two points in the case have not been considered. One is upon the question whether the plaintiff may

recover more than the amount of loss shown by his proofs of loss. This has been discussed in the above opinion, but the suggestion in particular is that in none of the cases cited was there a clause found in this policy. "The amount of loss or damage to be estimated according to the actual cash value of the property at the time of the fire, and to be paid sixty days after proofs of the same have been made;" and it is argued that the very contract or policy itself is to pay the amount of the loss after proofs of the same have been made by the assured. Would the counsel induce us to think that this clause creates the right or cause of action? Or that it means to give an unalterable amount of recovery? Or that it means to say that if paid, it is to measure the payment; and also, if not paid, that clause measures the amount of the recovery? That if action does not arise from it, the extent of recovery is limited by it? I had not thought so. I regarded this requirement of proof of loss as intended to give the insurer circumstances of loss as a basis for investigation and adjustment, and as fixing a time for payment. In *McMaster v. President, etc.*, 55 N. Y. 222, it is held that "proofs of loss do not form part of the contract of insurance, and the assured is not estopped from showing that a statement in the proof of loss was a mistake so far as it states facts going to annul the policy." Judge Folger said: "The proofs of loss do not create the liability to pay the loss. They do no more in this aspect than to set running the time at the end of which the amount contracted for shall be payable, and at which action may be brought to enforce the liability. All the elements of estoppel in *pais* are lacking. It arises from an act or declaration of a person intended or calculated to mislead another, on which that other has relied, and has so acted or refrained from acting as that injury will befall him if the truth of the act or declaration be denied." The clause in question in the policy is not the birthspring of the cause of action. Concede that the furnishing of proofs of loss, unless waived, is a condition precedent to the right of action, and still that is not the source or cause of action. In this case proofs of loss were furnished, and therefore, as to this, the right of action was complete. The mere fact that the

amount was too little, and the party in the suit afterwards claimed more, does not nullify this right of action. It is not denied that suit could be maintained for the amount of loss shown in the proofs under the clause quoted above from the policy; and so it would seem that the point touching the proofs of loss is one not entering into the very right of action, but only one of the finality or conclusiveness of the proofs of loss—whether the assured is bound by the amount therein specified, in the light in which it is regarded in the above opinion. In *Insurance Co. v. Pulver*, 126 Ill. 329 (18 N. E. Rep. 804) it was held that the insured is not estopped even by his sworn statement in his proofs of loss, but may give evidence of the actual amount of his loss, and recover accordingly. And a later case in Iowa—*Crittenden v. Insurance Co.*, 52 N. W. Rep. 548—holds that proofs of loss do not limit the amount of recovery if too small. The authorities cited above and in the former opinion will, I think, amply support the principle stated in this Court by Judge English and incorporated in the syllabus in *Rheims v. Insurance Co.*, 39 W. Va. 672 (20 S. E. Rep. 670) that: "Proofs of loss are no part of a contract of fire insurance nor do they create the liability to pay a loss. They serve to fix the time when it becomes payable, and when an action may be commenced to enforce a liability." I think that case settles, and settles properly, this point in the case. The clause relied upon has no such office as is contended for. I have no doubt it, or its equivalent clause, is found in all contracts of insurance; and, though the cases cited in the above opinion may not show its presence, doubtless it was in those policies upon which the decisions were based, but it was not regarded as performing the function now claimed for it.

As to the two cases relied upon by counsel as to the conclusiveness upon the assured of the proofs of loss—*Irring v. Insurance Co.*, 1 Bosw. 507, and *Campbell v. Insurance Co.*, 10 Allen 213—in addition to what I have said about them in the above opinion, I will say that the first case is condemned as *obiter*, and unsound in this respect, by the highest court of the state in which it was rendered. Per Folger, J., in *McMaster v. President, etc., supra*; and the case of *Campbell v.*

Insurance Co. is also disapproved. *Schmidt v. Insurance Co.*, 55 Mich. 432 (21 N. W. Rep. 875) holds against the estoppel of proofs of loss in the language: "An insured person is not estopped by his proofs of loss from showing losses not mentioned therein, unless the insurer, by relying on the proofs, has been placed in such a position that the admission of the further showing would be inequitable." If the loss has been paid when proofs of loss have been made, their function is at an end; and so, if not recognized and paid, but suit has been brought.

But perhaps I have not covered the exact point, or rather the whole scope of the exact point, made by counsel for plaintiff in error. He contends that even if, as to policies in general, the above be the law, still the policy in this case is peculiar in making the "amount of loss" payable only after "proofs of the same" are furnished; the usual expression in policies of insurance being "proofs of loss" or "satisfactory proofs of loss." The policy's language is: "The amount of loss or damage to be estimated according to the actual cash value of the property at the time of the fire and to be paid sixty days after proofs of the same have been made by the assured and received by the company." Does the word "same" refer to the word "amount" only, and thus limit the liability of the company to pay the same amount of loss or damage fixed in the proof of loss, no more and no less, as a matter of literal contract? Or may it as well be referred to the nouns "loss" and "damage," used, not in the sense of amount, but in the sense merely of the fact of the occurrence of loss? I incline to think it has the latter meaning. Grammatically it refers to them as well as, or rather than, to the word "amount." But we must get at the sense of the clause—the intention. Did the parties, in framing this policy, intend to tie down the insured to a recovery of just the amount specified in the proofs of loss unalterably, over all innocent mistakes of fact or law, and even where, as in this case, the company does not recognize or act on the proofs of loss, but denies them, and they cease to be longer material in the case further than to show the compliance with the clause requiring them as a condition precedent to the action? I do not

think such was the intention. I think we need not higggle over the mere words, but may say that "loss" or "damage" are here used in the sense of "amount," and yet the clause only means to demand of the insured proofs of loss before he shall sue, so as to give the insurer notice of the loss, and enable it to inquire into the facts, and adjust the matter, if it will, without suit. The clause itself tells the measure of liability in saying that the amount of loss or damage shall be "estimated according to the actual cash value of the property at the time of the fire." These words are just as much parts of the policy as are the words "amount" and "same," and they declare the actual value of the property to be the measure of liability. There can be no question about this. That value is the measure of recovery. It is likewise the measure for the estimate in the proofs of loss; but, if that estimate be mistaken, and it comes to litigation, that estimate does not infallibly govern, but we appeal to the policy, and it tell us that the actual value of the property shall govern.

If the proofs of loss contain by innocent mistake, which has not prejudiced the other party, an estimate too large or too small, it yields to the truth, the actual value, and does not as an estoppel close the mouth from speaking and claiming the truth. Another clause binds the company to make good all loss, not exceeding the amount of insurance, or the interest of the party; but it does not say "not exceeding the amount specified in the proofs of loss. If intended, why not insert that exception in such an instrument as an insurance policy, which in its draft has in these days attained an amplitude and clearness of expression and provision exceeding perhaps almost all other instruments; well nigh perfection. Shall a court, by mere construction, lean against the insured party, and defeat an indemnity stipulated and paid for, only because he has, by innocent mistake of fact or law, made his estimate of loss in his preliminary proofs too little, when the law is that where two constructions of a policy of insurance can be given, that most favorable to the insured must be given, and where there is doubt as to meaning of terms employed by the company

to except it from liability they are to be construed most strongly against the insurer. *Association v. Newman*, 84 Va. 52 (3 S. E. Rep. 805). Thus I see no reason for taking this policy out of the general principle above stated—that a mistaken statement in proofs of loss is not conclusive upon the amount of recovery. I had not regarded the question so grave as to call for this labored discussion, but a deference to the confidence in it manifested by the distinguished and able counsel for plaintiff in error seemed to demand it.

The petition for rehearing suggests as its second point that the foregoing opinion does not consider instruction No. 3 given for plaintiff, and that it is mistaken when it says that plaintiff's instructions Nos. 1, 2 and 3 "involve no principles of law not stated above." In the above opinion that language referred to the right of Bentley to recover in his name, and the extent of recovery, and the effect of proofs of loss; and it was thought that what was said did cover all really involved in instructions Nos. 1, 2 and 3, which are here given:

"(1) Whether the policies were delivered by Henry H. Bentley to A. W. Louth after the fire, the said Bentley saying to Louth at the time of such delivery to collect the insurance money, and apply the same to rebuilding on the mortgaged property, is a question for the jury; and, if they believe such was the fact, such retransfer of the policies by Bentley to Louth is not a bar, and has no tendency to prevent the plaintiff recovering in this action. (2) If the jury believe from the evidence that the plaintiff is entitled to recover, their verdict should be for the whole amount of the loss of A. W. Louth by the fire of April 15, 1890, on all of the insured property, estimated according to the actual cash value of such loss at the time of the fire, with interest on such amount from sixty days after the proofs of loss were received by the defendant company to the date of the verdict. (3) If the jury believe from the evidence that the plaintiff is entitled to recover in this action, they may find a verdict for whatever amount of loss the jury believe from the evidence A. W. Louth has suffered by the fire of April 15, 1890, with interest on such amount from sixty days after the proofs of loss were received by defendant company to the date of the verdict."

But it is pointed out in the petition that instruction 2 correctly limits, under the holding of this Court, the plaintiff's right to recover loss "on all the insured property estimated according to actual cash value of such loss at the time of the fire." but that No. 3 does not give this limitation to loss on property insured; but its language, without this limitation, would allow recovery on property not insured, and therefore ought not to have been given. In drawing the opinion, this point did not escape me; but I thought it wholly unreasonable to entertain the idea that the court below meant, or that the jury could understand it to mean, that there could be recovery for loss to property not insured, of which there was no proof, and that this matter need not be discussed. I still think so. Look at those two instructions and compare them. One of them tells the jury the loss must be assessed upon property insured; and the other, following it, not stating, or intimating to the contrary, would be read in harmony with it in that regard, and could not possibly suggest to the jury a right to do the unreasonable thing of going outside the policy, and charging the defendant with liability for loss to property which it never insured. The instructions are not inconsistent. It would be subserving a very critical construction to set aside a trial for such a cause as this. Can it be possible that the defendant was injured in this matter? I feel decided that it was not, could not have been. If we should criticise instruction 3, we would yet say it could not possibly have prejudiced the defendant, and would not be a ground of reversal. *Carrico v. Railway Co.*, 39 W. Va. 86 (19 S. E. Rep. 571) point 14.

Another question pressed by the brief of counsel for plaintiff in error on rehearing is that there is error in sustaining a demurrer of the plaintiff to a certain statement filed by the defendant. The declaration on the policy was the short form in section 61, chapter 125, Code, and the plea was that prescribed by section 64, that the defendant was not liable; and defendant filed a statement not here material, and later filed an additional plea and statement, to which the plaintiff demurred, and the court sustained the demurrer, and the plaintiff replied generally to the plea; so that I interpret the some-

what obscure record, as does the counsel for plaintiff in error, as admitting the plea and rejecting the statement. Counsel insists that entertaining a demurrer to this statement is error, because such a statement is not a pleading, but simply a notice of a defense, and therefore not subject to demurrer. Counsel asks us to review former conflicting decisions, and decide this question. He contends that such statements filed under sections 62-65 of chapter 125 of the Code, are but bills of particulars, not pleadings. This contention must rest on the idea that if such statement be definite enough to warn the plaintiff of the defense, no matter that the facts it states constitute in law no defense to the action, it can not be rejected on demurrer or objection, but must remain in the case, and its insufficiency be taken advantage of only on the trial by objection to evidence offered to sustain it. This is the view held in *Capellar v. Insurance Co.*, 21 W. Va. 576. Is it correct? The declaration upon a policy of insurance under common-law rules of pleading was necessarily long and tedious, and often open to assault, because of the length of the formal policy and its many provisos, conditions and stipulations; and, the declaration being thus long, often the pleas to it were also long and complicated; and the legislature, by section 61 and other sections of chapter 125 of the Code, intended to abolish this labored, prolix and complicated pleading in such actions by substituting the concise declaration and the short, simple plea that the defendant was not liable as in the declaration alleged. But the declaration and plea being so general, often gave no real notice of the real nature of the claim or defense, and therefore the statute gives the court or litigants power to require what is called a more particular statement in any particular respect, of the claim or defense, or of the facts expected to be proved at the trial. These statements, where proper, are intended to do what the generality of the statutory declaration or plea does not do; that is, state the real nature of the claim or defense. They tell the case; they alone. They are adjuncts or auxiliaries to the general pleading, amplifying it, giving it specification and certainty. They give, not evidence, but cardinal facts on which the demand or defense rests. Why are they not

pleadings? When filed, the party is confined to them in proof. Though an amplification or specification, why not treat them as amended declarations or pleas? A novel assignment under common-law is a pleading. They perform the functions of pleadings, and none that are not functions of pleading. And reflect that they take the place of the common-law declaration or plea. The statute has substituted them for the common-law pleadings. Herein they seem to me as differing from the mere bills of particulars accompanying declarations in *assumpsit* and pleas of payment, or bills of particulars under section 46, chapter 130, of the Code, which are not substitutionary for pleadings, as in those cases the pleadings are as required by common-law. Such bills of particulars we have held to be not pleadings. *Clarke v. Railroad Co.*, 39 W. Va. 732 (20 S. E. Rep. 696); *Capellar v. Insurance Co.*, 21 W. Va. 593. But the statute provisions as to statements in insurance are *sui generis*, applying only to those cases. If we hold these statements to be not pleadings, it results that a statement may be filed which, while clearly giving notice of a claim or defense so as to inform the adverse party of such claim or defense, yet states a claim or defense not good in law, and still it must remain in the case, and the adverse party can not appeal to the court to say whether it is good in law, but must bring witnesses, and incur other expense, to meet a claim or defense which at the trial is held insufficient. In other cases parties may at once challenge a declaration or other pleading by saying by demurrer that it is not such as to call upon him to answer it; yet here statements performing the same office are exempt from such challenge. Public policy in ending litigation speedily calls for our construction. And the words of section 66 justify it, as it says that if the statement be adjudged insufficient, the court may grant further time to file it, or allow amendment, thus contemplating that the court may be asked to condemn it; and this would be by demurrer. The close of the section does say that no statement sufficient to notify the other party of the nature of the claim or defense intended shall be adjudged insufficient, but I think we may reasonably say that the inten-

tion here is only to dispense with that precision, formality, and art required by the science of pleading, and not to let pass what is no claim or defense at all in law. This Court acted under this construction in the later case of *Deitz v. Insurance Co.*, 31 W. Va. 851 (8 S. E. Rep. 616) holding that the statement being a specific averment of the facts intended to be proved to sustain the action, must be considered a part of the declaration, and that a demurrer was the proper means of testing the legal sufficiency of the case as presented in the declaration and statement. Judge Snyder delivered the opinion, and though he and Judge Green were members of the Court when the *Capellar Case* was decided, and both still members when the *Deitz Case* was decided, no mention is made of the *Capellar Case*, but it was overlooked, or passed *sub silentio*. And in the recent case of *Rheims v. Insurance Co.*, 39 W. Va. 672 (20 S. E. Rep. 670) the same view of the statute is held, and such statements considered to be informal pleadings, for reasons given in that case by Judge English. A reconsideration of the question has brought us to the same conclusion in the present case. There is no error in merely entertaining a demurrer to the defendant's statement. As that statement set up a clause in the policy providing that suit should be brought within six months after the fire, and, giving dates, relies on the lapse of that time before the filing of the amended declaration, it presented no defense, as time stopped running as to the claim set up in the original and amended declaration when such original declaration was filed, for reasons given in the opinion filed upon the first decision of this case and published above.

There is another reason why there is no error in entertaining a demurrer to said statement, and it is that the additional plea was allowed, and that set up the same defense of limitation under said clause in the policy as that set up by the statement. I suppose it not necessary to set up a specific defense both by a special plea and a statement. Judgment affirmed.

CHARLESTON.

CARNEY *et al.* v. KAIN *et al.*

Submitted June 24, 1895—Decided November 9, 1895.

40	758
43	296
40	758
61	270

1. CONSTRUCTION OF WILLS.

For the will here in question, see *Whelan v. Reilly*, 3 W. Va. 597, and *Whelan v. Reilly*, 5 W. Va. 356.

2. CONSTRUCTION OF TRUSTS—ESTATE OF TRUSTEES.

The estate taken by the trustees is commensurate with the powers conferred and duties imposed for the purpose intended to be accomplished. In this case the property was given to the trustees in fee simple absolute and in absolute ownership, and such an estate was required.

3. CONSTRUCTION OF TRUSTS—CONTINUING TRUST.

Where the trustees are invested with the legal title not as a dry, passive trust, but with active continuing duties to perform, it is called an active continuing trust. Such was the trust in this case.

4. CONSTRUCTION OF TRUSTS—INTENTION OF TESTATOR—CONTINUING TRUST.

In such case the court, when called upon by the *cestuis que trustent* to close the trust and cause the property to be conveyed or turned over to them, ought to refuse to grant such request where it was the intention of the creator of the trust that the control and management of the property should be in the hands of the trustees, and subject to their discretion, or where the ultimate purposes of the trust have not yet been accomplished. For both reasons such relief was properly refused in this case.

5. CONSTRUCTION OF TRUSTS—POWER OF APPOINTMENT—DISCRETION OF TRUSTEES.

Where there is a power of appointment of a certain fund in the trustees to and among certain specified beneficiaries, subject to the unlimited and uncontrolled judgment and discretion of the trustees, such discretion is not to be interfered with in the absence of bad faith. In this case there was such power of appointment; and bad faith is not charged nor shown, but a faithful discharge of duty is alleged and affirmatively appears.

6. CONSTRUCTION OF TRUSTS—ESTATE UNDER POWER OF APPOINTMENT—EXECUTORY INTERESTS.

The estate which passes under such power of appointment comes not from the trustees, but through them from the donor, and does not, of itself, directly create any contingency in contemplation of

law, though it may naturally render the vesting of the executory interest created by executory devise more doubtful. In this case such power of appointment has no bearing in determining the quality of the executory interests created and declared.

7. CONSTRUCTION OF TRUSTS—MONEY—LANDS.

When money is directed or agreed to be turned into land, or land agreed or directed to be turned into money, equity will treat that which is agreed to be or ought to be done as done already, and impress upon the property, as to its being real or personal, that species of character for the purpose of devolution and of title into which it is bound ultimately to be converted. In this case the property was a residuary fund, comprising both real and personal property, and, although the trustees had full power to sell and convert the land into money, they were not expressly directed to do so, and such conversion was not necessary to accomplish the purposes of the trust.

8. CONSTRUCTION OF TRUSTS—CONTINGENT EXECUTORY INTERESTS—EXECUTORY DEVISE AND REQUESTS.

By the fourteenth clause of this will the testator created and declared in favor of the unborn beneficiaries designated, and to take effect in the event prescribed, certain contingent executory interests in such residuary fund in trust, by executory devise and bequest in fee simple and in absolute ownership.

9. CONSTRUCTION OF TRUSTS—FREEHOLD IN ABEYANCE—FREEHOLD TO COMMENCE IN FUTURE—REMOTE INTERESTS.

To such interests created by executory devise the common-law rule against putting the freehold in abeyance, and the common-law rule against creating freehold estates to commence in future, can not apply, (1) because it is conveyed in trust, (2) because it is created by executory devise, and (3) because the common-law rules are changed by statute. But they are subject to the rule against remoteness. That they do not contravene such rule is *res adjudicata*. See *Whelan v. Reilly* (1869) 3 W. Va. 597—a suit about the same will, between the same parties, or their privies in right or in representation.)

10. CONSTRUCTION OF TRUSTS—EXECUTORY INTERESTS.

Such equitable executory interest remains, with the legal estate, vested in the trustees until the time for it to vest in right or in enjoyment comes, when it springs up as an original whole of its own inherent strength, and vests in the one who may then be ascertained to have a right fixed in interest or in possession.

11. CONSTRUCTION OF TRUSTS—TIME OF CONSTRUCTION OF WILLS.

The will is to be construed as of the time when, ceasing to be ambulatory, it has become fixed by the death of the testator, and not in the light of subsequent events.

12. CONSTRUCTION OF TRUSTS—UNBORN DEVISEE—CONTINGENT ESTATE.

The estate of such unborn devisee is contingent, and can not, in the nature of things, become a vested, equitable estate until he comes into being.

13. CONSTRUCTION OF TRUSTS—EQUITABLE ESTATE—UNBORN DEVISEE.

For some purposes in contemplation of law the equitable estate is treated and considered as though the unborn devisee would probably come into existence.

14. CONSTRUCTION OF TRUSTS—EQUITABLE ESTATE—POSSIBILITY OF ISSUE.

It can not be said that such interest comprised in such bequest or devise has failed until it has become incapable of taking effect by the termination of the time or event prescribed. The possibility of issue is, in contemplation of law, only extinguished with life.

15. CONSTRUCTION OF TRUSTS—PARTIAL INTESTACY.

Therefore there can be no partial intestacy, for the will is valid, and the testator disposed absolutely, but contingently, of the whole residuary fund.

16. CONSTRUCTION OF TRUSTS—PRESUMPTION AS TO INTESTACY.

And the law presumes that the testator did not mean to die intestate as to any part of his property, unless such intent clearly appear.

17. CONSTRUCTION OF TRUSTS—UNBORN DEVISEE—CONTINGENCY.

For the contingency that the unborn devisee will not come into existence the testator did not provide, but left such contingency to be met and provided for by law.

18. CONSTRUCTION OF TRUSTS—EQUITABLE EXECUTORY INTERESTS.

If such contingency shall happen, then such equitable executory interest will spring up in its integrity and vest in possession, in present right of enjoyment in those who are then the heirs at law and personal representatives of the testator, who will take by descent and representation, and not by purchase.

19. CONSTRUCTION OF TRUSTS—POSSIBILITY OF RESULTING TRUST.

At the death of the testator, his then heirs at law, *etc.*, had the possibility of a resulting trust, contingent and dependent upon the unborn devisee not coming into being; somewhat in analogy to the possibility of reverter at law.

20. CONSTRUCTION OF TRUSTS—POSSIBILITY OF RESULTING TRUST—EXECUTORY INTEREST.

Such possibility of resulting trust was coupled with an interest. It was not vested, but the ones who would have taken if such contingency of the executory interest being incapable of taking effect should happen compose the class, and such class which would then take was ascertained, though it was liable to open.

21. CONSTRUCTION OF TRUSTS—POSSIBILITY OF RESULTING TRUST
—STATUTE OF DESCENT AND DISTRIBUTION—STATUTE OF
WILLS—ALIENATION *Inter Vivos*.

Such possibility of a resulting trust to such heirs at law, *etc.*, was transmissible under the statute of descent and distribution, and therefore by devise and bequest under the statute of wills; also by alienation *inter vivos*

22. A case in which these principles are discussed and applied.

HENRY M. RUSSELL for appellants, plaintiffs below, submitted the following brief:*

This suit is entirely amicable in its character. It relates to the disposition of a fund held by the principal defendants as trustees. These trustees are entirely willing that the fund may be disposed of in accordance with the prayer of the bill, provided only they can feel sure that a decree making that disposition of the fund will protect them from the possible claims of persons who may, at the death of Mrs. Carney, assert an interest in the fund as having come to them by the intervening death of some of the present claimants.

In the court below it was argued on behalf of the trustees that they should be protected by an authoritative decision of this Court which would not only determine the rights of the parties to this suit, but which would be a binding enunciation of the law of the state with reference to future controversies between other parties. It was therefore suggested, as a reason why the Circuit Court should refuse the relief prayed for, that a decree by the Circuit Court for the plaintiffs, which might happen to be affirmed by this Court because the judges of this Court might divide equally upon the questions presented, and would consequently not settle the law, would not afford the desired protection. This argument, one of the strongest which was presented by the trustees to the Circuit Court, can of course have no weight here.

Philip Reilly by his will appointed trustees, of whom the present trustees are the successors. By various clauses of his will he constituted a residuary fund, consisting of real and personal property, and constituting the residue of his estate, by the second clause of the will he devised and be-

*Briefs of Counsel given in full by direction of Court.

queathed to the trustees. In this second clause the measure of the estate given the trustees was not expressed, but the language used was broad enough to create a fee. By the ninth clause the trustees were directed to convert the estate into money, so that the testator expected the fund to consist of personal property, though in fact the trustees still hold a part of it as real estate. The fourteenth paragraph of the will is as follows:

"Fourteenthly. After the death of the last survivor of my three children, William, Philip and Mary Jane, the said residuary fund shall be held in trust for the children and other descendants then living of my said three last named children, or such of them as may have a descendant then living, and all such descendants shall have equal shares as among themselves without regard to any differences in degrees of relationship or descent."

William died during the lifetime of the testator. Philip and Mary Jane survived the testator, Mary Jane being one of the present plaintiffs and appellants. Philip died unmarried and intestate.

At the testator's death his only heirs at law were Philip and Mary Jane, a son and daughter, and John, another son, who has since died intestate. It does not appear, and is unimportant, whether John or Philip, the son of the testator, died first. At Philip's death his heirs at law were Mary Jane and John, or John's children. At John's death he left surviving his children, who with Mary Jane are the present plaintiffs and appellants.

The testator having died leaving no widow, it will be seen from this statement of the facts that the present plaintiffs represent together the interests and are vested with the estates, whatever they may be, of all persons who were the heirs of the testator at any time since his decease. If the period of the testator's death is to be looked to, the present plaintiffs represent the interests of Mary Jane and the two surviving sons, and so if the present period is to be looked to only.

The trustees say that the persons who happen to be the heirs at law of the testator when Mary Jane shall have died,

determining those persons as though the testator had died coincidently with Mary Jane, will be entitled to the fund. The trustees insist, therefore, that, as it can not be told now who these persons will be, a distribution of the fund can not safely be made. They say that one of the present plaintiffs, a child of John and a grandchild of the testator, may die leaving children who will survive Mary Jane, and in that case that these children would be entitled to the fund directly, and not through their immediate parent. The plaintiffs claim, on the other hand, that immediately on the death of the testator, an estate in the fund vested in the testator's heirs, that is, in those persons who were the testator's heirs at his death, though their estate was liable to be defeated by the death of Philip and Mary Jane leaving the descendants of either surviving them, and that this estate has passed by regular course of inheritance until it now resides, as a vested estate, in Mary Jane Carney and those of the other plaintiffs who are children of John Reilly.

The controversy presents the same question which would be presented if Mary Jane were dead, and if one of John's children were dead leaving descendants, and a share of the fund were claimed by the administrator of this deceased child of John, on the one hand, and by John's descendants, claiming immediately from the testator, on the other hand. Or, the same question is presented as though the trustees had paid a share of the fund to one of John's children, and he had afterwards died leaving children, who were again claiming this share from the trustees.

It is conceded in the case that there is no possibility that Mary Jane will have children, and therefore it is certain that the contingency will never occur on which the fund, under the fourteenth clause of the will, was to go to the descendants of William, Philip and Mary Jane. While the death of Mary Jane has not yet occurred, it is entirely proper, if there is a vested estate in the present claimants, to direct a distribution of the fund without waiting until Mary Jane's death. If the present claimants have a vested estate in the fund, so that it must go eventually on the failure of the contingency to the present claimants or to those who shall then represent

them and who will take because they represent them, they should be permitted to enjoy the estate at once, since it has become apparent that the contingency which was to defeat them can never happen. The chancellor acted upon this principle in the case of *McComb v. Miller*, 9 Paige 265. In the more recent case of *Male v. Williams*, 48 N. J. Eq. 33, a legacy had been left by will to the children of a woman yet unmarried, with a provision that if she should die leaving no children the legacy was to go to others, who were named. She afterwards married and had children, and these children claimed that the legacy should be paid to them, although their mother was still living. It appeared that the mother was sixty eight years of age and had been a widow for a number of years, and that there was no possibility, according to the ordinary laws of nature, that she would ever have any other children. The court held that the children took vested interests in the legacy at birth, subject to open and let in other children who might afterwards be born, but that under the circumstances above referred to there was no reason why the children's enjoyment of the legacy should be postponed until the mother's death, and therefore directed payment accordingly.

I do not understand, however, that the trustees in the case at bar insist upon any objection growing out of the possibility of Mary Jane's having children or leaving descendants. The controversy turns upon the question whether the plaintiffs have vested interests in the fund, or merely contingent interests dependent, as to John's children, upon their surviving Mary Jane.

I.—*The estate in the trustees.*

It was argued in the lower court that the will gave the trustee a fee simple estate in the fund; that it was impossible after the entire fee had been thus given that any estate should remain or be left in the testator's heirs. The conclusion was then drawn: that the plaintiffs had no vested estate, but that, upon the death of Mary Jane, a new estate would arise in the persons who might then be properly described as the heirs of the testator. We might concede in the fullest manner that the trustees took an estate in fee

simple in the fund, and yet the conclusion sought to be deduced would by no means follow. As will be more particularly insisted upon in discussing another branch of the case, it is not important whether the plaintiffs have a vested interest in the legal, or only in the equitable or beneficial estate in the fund. If they have a vested equitable estate, the trustees, though holding the legal fee, hold it only as a dry trust for the benefit of the appellants, the equitable owners, and the propriety of distributing the fund at present would be equally manifest.

But the estate of the trustees is not to be measured by the language used in devising or conveying to them, but by the purposes for which the trust is constituted. No matter how broad may be the description of the estate given, yet, if the trust created is to be only for a limited period, the estate of the trustees will be limited to the same period and will cease when that period shall have expired. The leading case of *Doe v. Considine*, 6 Wall. 458, fully illustrates this principle. In that case the devise was in the technical language appropriate to convey a fee, being to the trustees and to their heirs. The trust was to a son for life and, upon the decease of the son, then to the child or children of the son, and their heirs forever. The controversy was between the heirs of a deceased daughter of the son, on the one hand, and the trustees or their heirs on the other. The court held that, upon the birth of the son's daughter, a fee vested in her; that it was not important to determine whether this fee was legal or equitable in its character, for if it was equitable the same rules would apply to it as though it were a legal estate. But the court says: "When a trust has been created, it is to be held large enough to enable the trustee to accomplish the objects of its creation. If a fee simple estate be necessary, it will be held to exist though no words of limitation be found in the instrument by which the title was passed to the trustees, and the estate created. On the other hand, it is equally well settled that where no intention to the contrary appears, the language used in creating the estate will be limited and restrained to the purposes of its creation. And when they are satisfied, the estate of the

trustee ceases to exist, and his title becomes extinct. The extent and duration of the estate are measured by the objects of its creation."

It was urged, however, in the court below that the trustees were given power to sell the property which was devised to them, and to sell in fee simple. From this it was argued that a fee was given them by the devise, because it would be unreasonable to suppose that those who were to convey in fee were to take any less estate. A number of authorities were cited in which it was held that where the estate of the trustees was not described in the devise the direction to them to sell would imply a fee. We have no quarrel with these cases, which involved merely the question what estate, under such circumstances, would pass by the deed of the trustees. Unquestionably the trustees under the present will could pass to a purchaser from them a fee in any property they might sell. This however, throws no light upon the question what estate they have in property which they do not sell. The right to convey a fee does not by any means infer a fee in the person who makes the conveyance. It is quite usual for a testator to give property to one for life and to superadd to the gift a power to sell in fee, and in such instances it is only when the power extends not only to the conveyance of the property, but to the absolute and uncontrolled disposition and use of the proceeds, that such power is construed to expand the life estate into a fee simple. It must be observed here that the power which the trustees have to sell is a power to sell, not for their own benefit, but for the benefit of the fund. The fund is given by the will an individuality apart from the portions of the estate which compose it. These may be changed at the discretion of the trustees; the fund remains. This view of the situation of the fund and the estate of the trustees in it, is illustrated by the decision of the Supreme Court of Rhode Island, *In re Kenyon*, 17 R. I. 149. The testator devised and bequeathed his entire estate to a trustee and his heirs for the life of the testator's son Daniel, with power to the trustees to sell any portion of the property with Daniel's consent. Any of the property which should remain was given, after the death of

Daniel, to the testator's right heirs. Daniel died without ever having had any children, and the property was claimed by Daniel's administrator, on the one hand, and by the testator's then heirs, on the other. At the time of Daniel's death he was the testator's only son and heir. The court held that the estate of the trustee, though in terms a fee simple, and though an express power to sell was given, was nevertheless only an estate for Daniel's life.

II.—*The estate of the equitable devisees of the fund.*

No interest or estate was given by the will to William, Philip or Mary Jane. The portions of the residuary fund which should be given to them, or any of them, was left to the uncontrolled discretion of the trustees. After the death of the survivor of them, however, the residuary fund was to pass to their children and other descendants then living. This gave a contingent remainder to the children and other descendants of William, Philip and Mary Jane. The will expressly says that the fund is to go to such of them as may be living, so that the remainder was contingent with respect to the persons who were to take. Neither William, Philip or Mary Jane ever had a child, so that the problem is not confused by the question, which would have arisen upon the birth of a child to one of them, whether the remainder would then vest in that child or would still be contingent upon his surviving William, Philip and Mary Jane. The remainder in the present case belongs to the fourth class of contingent remainders as they were classified by Mr. Fearn, that is, remainders limited to a person not ascertained or not in being at the time when the limitation is made. 1 Min. Inst. 389, 391; 4 Kent. Com. 207. In the case of *Temple v. Scott*, 143 Ill. 290, land was conveyed to a trustee upon trust to hold for a woman during her life, and after her death then to her children if any should survive. This was held to create a contingent remainder to the children who should survive at the death of the *cestui que trust*. See also *Coots v. Yewell*, decided by the Supreme Court of Kentucky in 1894, and reported 25 S. W. Rep. 597.

III.—*The estate in the heirs of the testator.*

When a devise is made of a particular estate followed by a

contingent remainder, the fee remains in the heirs of the testator until the happening of the contingency, and remains there as a vested estate. It is, it is true, subject to be defeated and divested by the happening of the contingency, but it remains in them until that event occurs. The fee does not pass out of the testator's heirs and fall back to them as a new estate if the contingency does not happen, which would be to reverse the order settled by the law.

The question presented is the same whether the devise stops after creating the particular estate and the contingent remainder, leaving an intestacy with respect to the reversion, or whether the devise, after creating the particular estate and the contingent remainder, expressly gives the property over on the failure of the contingency either to the testator's heirs or to another devisee. In the one case, the question is whether the heirs as such retain a vested estate, subject to be divested by the happening of the contingency. In the other case, the question is whether the remote devisee take such a vested estate. Thus, in the case at bar, the testator created the particular estate and the contingent remainder, and died intestate as to the reversion. If, instead of doing this, he had provided for the particular estate and the contingent remainder, and then had added a provision that upon the death of the last survivor of William, Philip and Mary Jane, if no children or descendants of either of them should survive, the estate should pass to the testator's heirs at law, precisely the same state of facts would have been presented, and precisely the same questions would have arisen, as now arises in the present case. In like manner, the question would have been the same if the testator had provided that, after the termination of the particular estate and upon the failure of the contingency, the fund should go to some designated person, other than his heirs at law. In all these instances the question is whether the reversioner, or the remote remainderman, has a vested estate. It is because of the identity of the questions that I have deemed it strictly pertinent to cite authorities which have arisen on any one of the three classes of circumstances. I am justified in this course not only by the obvious reason-

ableness of it, but also by the example of the Supreme Court of Virginia in the case of *Stoaks v. Van Wyck*, 83 Va. 724. In that case the testator devised land to his daughter for life, and provided that if his daughter should die leaving issue the land was to go, at the daughter's death, to such issue and to his, her or their heirs forever; but if the daughter should die without leaving issue, the land should pass and descend to the daughter's heirs. At the testator's death this daughter was the only heir at law. She sold the property and conveyed it as her own, although she never had issue. At the death of the daughter those who were the testator's then heirs, that is to say, who would have been his heirs if he had died at the same time as his daughter, claimed the property. There was thus presented the same question identically which is presented in the case at bar, except that in that case there was an express devise to the testator's heirs, while in this there was merely an intestacy which permitted the heirs to take by the laws of inheritance. If Mary Jane were dead, and if one of John's children, the plaintiff's, were dead, leaving issue who were claiming from the trustees the share which had already been paid to the father of such issue, the two cases would then be precisely parallel even to the remotest circumstance, except for the difference already noted in the manner in which the heirs of the testator made their claim. There would be the same life estate, the same contingent remainder, the same dispute between the heirs of the testator at his death and those who are called his heirs at the failure of the contingency. The Supreme Court of Virginia held that the daughter, as the heir of the testator, took at his death a vested estate in the land, subject to be defeated by the happening of the contingency, but becoming absolute when the contingency failed. On page 734, however, the court suggests that it may be true that the limitation of the ultimate interest to the heirs of the testator is, in the event of the failure of the prior limitation, tantamount to the testator's dying intestate as to that interest or reversion. In that event, says the court, that interest or reversion would have passed or descended to the daughter of the

testator as his only heir, and would have vested in interest in her immediately upon the testator's death.

The law favors the vesting of estates, and in doubtful cases leans toward the earliest time at which they may vest. *Cooper v. Hepburn*, 15 Gratt. 551. If it were doubtful whether the estate, which must manifestly go to the heirs of the testator in this case at some time, should be held to vest at his death, or only on the failure of the contingent estate, the former rather than the latter time would be adopted. *McArthur v. Scott*, 113 U. S. 378. Here the estate vested on the testator's death in his heirs, Philip, Mary Jane and John. Philip having died unmarried and intestate, his interest passed to Mary Jane and John. John having died intestate and leaving no widow, his interest has passed to his children, some of the present plaintiffs. The reversion in this fund is therefore a vested interest in Mary Jane and in John's children, which can never be divested, for the contingency which might have divested it can never happen.

If this undisposed of reversion has not vested in the heirs of the testator, where has it been residing?

It is not in the trustees. Their estate is measured by the beneficial interests given by the will, and there is no disposition made in the will of this reversion. Their estate must absolutely determine upon the death of Mary Jane. Or, if the trustees are still to hold the legal title, then this reversion is an equitable estate in reversion. The equitable estate is not in the trustees but, as was said by the court in *Doe v. Considine*, 6 Wall. 469, the same rules of law apply to descents and devises of equitable as to those of legal estates, and if this was an equitable fee in reversion in the testator's heirs, it vested in them in precisely the same manner as it would have done had it been a legal estate.

The title is not in the contingent remainderman, for there are no such persons in being, never have been, and never will be.

The fact that Philip and Mary Jane were not only intended to be beneficiaries during their lives of the income of the fund, and of such of the principal as the trustees might give them, but also occupied, with John, the position of heirs in

whom the reversion vested, does not militate against the principle which is now being insisted upon. In the case of *Stoaks v. Van Wyck*, 83 Va. 724, the testator's daughter was the life tenant, was also the person whose death was to occur before the contingent remainderman could take, was also the person whose issue, if she had any, were to take the remainder, and yet was also the testator's sole heir, in whom the court held the remainder or reversion to have vested. See also *Coots v. Yewell*, 25 S. W. Rep. 579.

The authorities are abundant and uniform in favor of the proposition that under such circumstances the heirs of the testator take a vested estate. From the case of *Purefoy v. Rogers*, 2 Wms. Saund. 386, which was decided by Lord Hale in the reign of Charles II., there has been no departure or dissent down to the present time. Chancellor Kent announces the doctrine as an established canon of the law. 4 Kent Com. 257. The more recent authorities in this country are equally express and unequivocal.

Reference has already been made to the case of *Stoaks v. Van Wyck*, 83 Va. 724, as being precisely in point. The case of *Robinson v. Robinson*, 89 Va. 916, is quite as apposite, and in it the estate vested as a reversion to the heir of the testator, and not by virtue of a limitation in the will.

The case of *Coots v. Yewell*, 25 S. W. Rep. 597, is equally in point. A father conveyed land to his son, Sydney, for life, remainder in fee simple to the children, heirs and legal representatives of Sydney. Sydney was then unmarried, and he never thereafter had any children. After the father's death his other children, the brothers and sisters of Sydney, conveyed to Sydney all their interest in the property. Thus Sydney became entitled to whatever vested estate was at that time in the grantor's heirs. Sydney sold and conveyed the property, and after his death the grandchildren of the grantor, the children of a brother who had joined in the conveyance to Sydney and who had died before Sydney's death, sued for the property. They suggested the same claim which the trustees in the present case suggest on behalf of the possible grandchildren of John, namely, that they took directly as heirs of the grandfather, that their

father and his brothers and sisters had no estate vested in them during Sydney's life, and therefore that they were entitled to the property notwithstanding the deed made by their father to Sydney. The court, held, however, that the remainder to Sydney's children was a contingent remainder, depending on the contingency of their surviving Sydney; that the fee remained in the grantor, notwithstanding the conveyance, and passed to his heirs, so that the deed made by his children, though before Sydney's death, passed the fee subject to be defeated by the happening of the contingency provided for. A petition for a rehearing was overruled. 26 S. W. Rep. 179. In this case it will be noticed that there was a reversion in the heirs of the grantor, and not a limitation to them in the conveyance by which the particular estate and the contingent remainder were created.

In the case of *Harens v. Seashore Land Company*, 47 N. J. Eq. 365, the testator devised land in fee tail to his son Elisha with remainder, after the estate in fee tail, to the testator's son John. During Elisha's life, and of course therefore before the failure of the contingency, John executed a conveyance whereby he undertook to convey his right, title and interest to the defendant. Elisha never had issue, so that his estate was really a life estate with a contingent remainder to his issue if he had any. Elisha died and John having died before him, John's children laid claim to the land, insisting that they were the heirs of the testator as of the time of Elisha's death when the contingency failed, and that the estate passed to them at that time. The court, however, held that the remainder in John after Elisha's estate tail was a vested remainder, although it was uncertain before the contingency happened whether it would ever take effect in enjoyment, and therefore that John's deed, being the deed of one who then had a vested estate, passed the title to defendant.

The facts in the case *In re Kenyon*, 17 R. I. 149, have already been stated. In that case there was a trust expressed to be in fee with a power to sell. The life tenant was, as in the Virginia case, the testator's heir and the person whose death was to determine the particular estate and to fix the time

within which the contingency must happen, yet the court held the estate in the life tenant, as the heir, to be a vested estate, and held his administrators and heirs to be entitled as against the claims of those who would have been the heirs of the testator at the time of Daniel's death, if the testator had then died.

In the case of *Lepps v. Lepps*, 16 S. W. Rep. 346, decided by the Supreme Court of Kentucky, 1891, a testator, who died without children, devised his property to his wife and if she should marry again and have children, then to any children she might leave surviving her, and if she should die without surviving children, then to the testator's brothers or their children. Thus, as will be perceived, a contingent remainder after the widow's death was created in favor of any children she might leave surviving her. Before the death of the widow, and while it was still uncertain whether the contingent remainder would take effect or not, one of the testator's brothers, B, died childless and by his will left all his estate to his widow. The testator's widow then died childless, so that the contingent remainder failed. B's widow claimed the property under the will in her favor, and the testator's other brothers claimed adversely to her. The precise question presented by the case at bar was thereupon raised, and the court held that, even during the lifetime of the testator's widow, B had a vested estate in the property, and that his share passed by his will.

In the case of *Hill v. Barnard*, 152 Mass. 67, a testator left a fund to a trustee in trust for a son for life, with power in the trustee at his discretion to consume the principal of the fund for the son's benefit. The will provided that, on the son's death, the whole fund was to go to the son's issue, but if the son left no issue the fund was to go to persons named in the will. It will be seen that there was a contingent remainder in the son's issue who might survive him, contingent both upon the surviving of the issue and upon the failure to consume the fund in the son's lifetime, just as in the case at bar the entire fund might be consumed by the trustees for the benefit of the children named in the will. Some of the remote legatees, who were to take on the son's

dying without issue, themselves died before the son, and the testator's son having finally died without issue, the court held that the legatees who died before the son had a vested estate in the fund, and that their shares passed to their administrators.

A great number of authorities, many of which are cited in the cases to which reference has been made, might be brought to the attention of the Court as bearing upon one or the other of the different branches of the proposition under discussion. It has been deemed best, however, to confine the citations to the cases in which the precise question which is presented here has been passed upon by the courts. It will be found that in every one of the authorities referred to in this branch of the case, there was a contingent remainder after a particular estate, and either a reversion to the testator's heirs because of a failure to dispose of the residue after the contingent remainder, or else a limitation over after the contingent remainder. It will be found that in all of them, under a variety of circumstances, the precise question was passed upon, whether this reversion, or this ultimate remainder, was a vested estate pending the time until it should be ascertained that the contingent remainder had failed. In every one of them it was decided that this estate was vested, and in none of them was the determination of the persons who were to take postponed, as the trustees would have it postponed in the case at bar, until the termination of the particular estate and the failure of the contingent remainder.

IV. In the court below it was suggested that the estate of the trustees was, at most, a base or determinable fee limited to last until the death of William, Philip and Mary Jane without descendants. The right of the plaintiffs is so clear upon the theory of the case which has already been discussed that it will perhaps conduce rather to confusion than to clearness to urge this other theory of the case. While the estate of the trustees was to last for an uncertain period, yet as it must necessarily determine at the end of lives in being at the testator's death, it could scarcely with propriety be treated as a fee of any description. As this feature, however, was the subject of elaborate discussion in the Circuit Court, it

may be at least not without interest to present here the authorities which were collected upon that subject.

The plaintiffs urged that, if the estate of the trustees was a base or determinable fee, the right of reverter remained, as a vested estate, in the heirs of the testator; that the consequence of this would be, just as upon the other theory of the case, that the present plaintiffs having vested estates, could receive the fund with safety to the trustees, and that after the death of Mary Jane no one could claim any part of the fund except as claiming through the present claimants. In that case he would of course be estopped by their receipt of the fund. It is not proposed to elaborate this branch of the case, but to state briefly our position with regard to it.

Notwithstanding the statute of *quia emptores*, a base fee can be created in this country. *Universalist Society v. Boland*, 29 N. E. Rep. 524, where Mr. Gray's views, as set forth in his essays on rule against perpetuities, are repudiated by the Supreme Court of Massachusetts. See also 2 Min. Inst. 86; *Bolling v. Petersburg*, 8 Leigh 224. The right of reverter is a vested estate remaining in the heirs of the grantor or deviser. 2 Min. Inst. 78; 1 Wash. Real Prop. 91 (*64); 4 Kent Com. 11; *Church v. Grant*, 3 Gray 142; *Sheetz v. Fitzwater*, 5 Pa. St. 116. Our statute law fairly covers the subject. *Ochiltree v. McClung*, 7 W. Va. 532.

The case is certainly one which commends itself very strongly to the consideration of the Court. The plaintiffs should have the relief prayed for unless the Court is clearly bound, by some inflexible rule of law, not to grant it. The trustees, of course, have no interest and no desire to prevent this. So long as they can be protected by a decree of the Court, they are more than willing to turn over the fund. The granting of the relief prayed for will be manifestly a very great advantage to Mary Jane, the only survivor of the three children for whose benefit the fund seems to have been primarily created. Should Mary Jane die under the present circumstances she could not direct the disposition of the minutest portion of the fund. Neither those who may be caring for her in her old age, nor those whom she may herself have taken under her protection, nor any who may

have personal claims upon her of affection or gratitude, can derive any benefit from the fund or any portion of it. As is set forth in the bill, the plaintiffs have agreed among themselves that, if the fund can be now divided, a very substantial portion of it, twenty thousand dollars, shall be given to Mary Jane as her absolute property, to dispose of as she may wish. It may well be thought that this amount would in her case greatly help to smooth the footsteps of declining age, and that it would be a great source of comfort to her during the few remaining years of her life, and of pleasure to her at her death, to be able to pay with this her debts of gratitude, or offer her tributes of affection.

With respect to the other plaintiffs, the question of the enjoyment of the fund is between them and their children. If the decision of this question could be left to the children themselves, it is not going far to presume that filial affection would readily accord to the parents the enjoyment of the fund. This ought to be the decision, and the court might well lean, if it were necessary toward a conclusion so proper in itself. But it is unnecessary that such considerations should be emphasized. The right of the plaintiffs is clear under the law, and the decree of the Circuit Court should be reversed.

W. P. HUBBARD for appellees, defendants below, submitted the following brief:

The position of the defendants, the trustees under Philip Reilly's will, with respect to this controversy is stated in their answer. They have no personal objection to the decree asked by the complainants, if the will making them trustees would permit such action, and if they could safely consent to such a decree; but they are advised that they can not safely consent, and that the terms of the will do not permit such decree.

Their defense, therefore, while in some sense friendly, is not merely formal.

As the brief for appellants says, it was suggested in the court below on behalf of the defendants (the suggestion being addressed to the appellants' counsel as well as to the

court) that a decree should pass in favor of the defendants in the Circuit Court, because a decree for the complainants, if affirmed by a divided court here, would not protect the trustees, as such affirmance would not under section 4 of art. VIII of the State Constitution be of binding authority in all subsequent cases in all courts of the state, and the decree itself would not be binding upon heirs of Philip Reilly not parties to this suit, in whom the estate might hereafter vest according to the views of the trustees.

That suggestion, however, was not given the slightest weight, either by the Circuit Court or by appellants' counsel, and the decree appealed from was only reached after full and elaborate argument and reargument, oral and written, by counsel, and careful and profound consideration by the court. The value of the judgment of that court is not lessened by reason of that fruitless suggestion of defendants' counsel.

There are some considerations which should be borne in mind throughout the discussion and decision of this case and the influence of which should be felt at every stage.

First. The principal defendants are trustees under the will of Philip Reilly and are bound to carry out the trusts imposed upon them by that will. Before the time fixed by the will for the determination of the trust, the Court is asked to put an end to the trust by its decree and to require the trustees to distribute the trust fund. The trustees suggest that at the time at which the will requires them to make distribution, which they insist is the time of the death of Mrs. Carney, there may be others than the present plaintiffs entitled to share in the distribution. If this should be true, these others not being parties to this suit would not be bound by the decree of this Court. The trustees having no personal interest in this matter, but being responsible for the due execution of the trust reposed in them, ought not to be required to yield up their trust and distribute the trust fund, except by a decree which will afford them the fullest protection when they comply with its requirements. Such persons (other than the present plaintiffs), who may be entitled to share in the distribution at the time it is to be made, may be citizens of states other than West Virginia and so entitled to

resort to the United States Courts. Those courts, while of course giving great weight to the views of this Court, would not be bound by its adjudication upon a question of general law such as is here presented. In the case supposed a decree requiring the trustee to pay would not be of authority against such subsequent claim. Therefore only the clearest convictions upon the part of this Court will warrant it in disturbing the decree of the court below, and any and all doubts entertained by this Court should be resolved in favor of the defendants, so that they may have as nearly as possible that complete protection in acting under the decree if it be adverse to them, which it must be conceded persons in their situation are entitled to.

Second. By the twenty second clause of his will, Philip Reilly authorized and required all questions of doubt and controversy arising under his will to be determined, adjudged and finally decided by the trustees. If this clause be valid and controlling, the judgment of the trustees that they can not safely act in the method suggested by the bill should require a decision against the plaintiffs. Such provisions as that contained in the twenty-second clause are valid and will be given effect by the court. 1 Redfield on Wills *442.

Third. The question here presented is to be decided according to the language of the will of Philip Reilly unaffected by any consideration of what might have happened or what actually has happened. Jarman's Rule XXI, 1st Redfield on Wills *428; *Outland v. Bowen*, 115 Ind. 150-158.

The question would be precisely the same if Mrs. Carney had half a dozen children now living, or William and Philip Reilly had each left as many children still surviving. In that state of affairs there would have been no temptation for wire drawn argument and it would have received scant consideration.

If, as plaintiff claims, there has always been a reversion in Philip Reilly or his heirs, then during the long history of this trust, if there had been trespass or waste on property belonging to the residuary fund or any injury affecting its substance, those heirs would have had a right of action. A reversioner having a vested interest in reversion may sue for

any injury to the inheritance, 4 Kent 455. A reversioner may sue for an injury to property while held by a life tenant. *Harvey v. Skipwith*, 16 Gratt. 393.

If the plaintiff's position be correct, these heirs of Philip Reilly might in the case supposed (of an injury to the fund and of a large number of children to Mary Jane, Philip, and William) have brought a suit for such injury. In such a case no one could have been found to suggest that any one except the trustees would have such right of action, and yet, the question is precisely the same as that now presented under different circumstances.

Fourth. The plaintiff's theory is that this reversionary right was undisposed of by the will, in other words, that as to this reversion now claimed by the heirs, Philip Reilly died intestate. We deny this and say, that this will did what it says it did, disposed of all the estate of the testator, real and personal. This intent is plainly manifest from the will.

In the question here presented, there is therefore involved the question whether this will is to be construed as if there were a partial intestacy of the testator. If, as we claim, there was no partial intestacy, then the testator's whole estate, including this alleged reversion, was disposed of by the will. The rule is to construe a will so as to prevent intestacy, entire or partial. Thus it is said in *Boston Safe Deposit & Trust Co. v. Coffin*, 152 Mass. 95; 8 L. R. A. 740. "Where an intention to dispose of the whole of an estate appears in a will a partial intestacy should not be recognized unless the deficiencies of expression are such as will compel it."

The case was much like the one at bar, the heirs of the deviser claiming that by the failure of issue of a devisee a share devised to him for life reverted to them as not being disposed of by the will, but the court was so adverse to that construction that it practically supplied language in the will to accomplish a different result.

Many cases are cited in the note in 8 L. R. A. to the proposition that a will must be so construed as to avoid a partial intestacy.

The clauses of the will and the facts in the case which the defendants are advised are important are set forth in their answer.

The real dispute between the parties, though it be illustrated by many suggestions and be stated in many different forms, really lies in a very narrow compass. It is whether an estate, a grantable, devisable, descendible estate, in this residuary fund vested in Philip Reilly's heirs at the time of his death or whether there was in them a mere possibility of reverter which could not vest until the death of William, Philip, and Mary Jane, childless.

The importance of the dispute grows out of the fact that when the last named event shall occur, and the estate shall vest according to our views, the heirs of Philip Reilly in whom it will then vest may not be the same as those who now join Mrs. Carney as co-plaintiffs. Some of the present plaintiffs may die in the meantime. The shares which these plaintiffs pray may be paid to them will, as to such of them as may die before Mrs. Carney, turn out to belong to their survivors, whether their children or their co-plaintiffs, and the trustees when called upon by those entitled to these shares at the time when they shall vest, will find no protection under a decree against them in this suit. The question as to the time when these interests vest has been decided by the Court of Appeals in *Whelan v. Reilly*, 3 W. Va. 597, 612, a case to which the present litigants were privy, and has been decided upon the admission of the parties. "It is admitted," the Court says, "that the estates bequeathed by the residuary clause must vest, if at all, on the death of the survivor of the three persons, John, William, and Mary Jane."

It will be well to consider the difference between a right of reverter and a possibility of reverter. Of course it is necessary at the outset that the words used in this discussion shall be understood clearly and in the same way by the disputants. No progress will be made if we use the word "right," some of us meaning that which justly belongs to one, and some of us meaning that which one may or may not receive. The plaintiff's counsel said in his argument below that he was unable to conceive of a possibility which is not also a right. He

therefore concluded that right and possibility mean the same thing and that where judges and law-writers say "a mere possibility" he is at liberty to substitute the word "right." These words in their common acceptation may be defined as Webster does. "Possibility. That which is possible; in law a contingency; a thing or event that may or may not happen; a contingent interest in real or personal estate." "Right." That which justly belongs to one; that which one has a claim to possess or own." Anderson's Law Dictionary says: "Possibility. An event which may or may not happen." "Right. An enforceable claim or title to any subject matter whatever."

Plaintiffs' counsel said it was difficult to define this possibility without calling it a right, because it is something which is proper to the grantor and which does not belong to mankind generally. It is possible that a son may hereafter inherit from a father who is still living. It is not possible that mankind generally should inherit from that father. The possibility is proper to that son only. Yet even Mr. Russell would hesitate to say that that son had a right to so inherit.

The fact that a thing is possible to one and not to others does not change the nature of a possibility and transmute it into a right.

It is true that text-writers have in their indexes and in casual references spoken of a right of reverter, but the text-writers who do this, and all other text-writers, when they come to accurate statement and description, speak of a reverter or possibility of reverter as distinct from a reversion. Thus Chancellor Kent, vol. 4, page 10. "It is a possibility of reverter when the estate determines;" page 11. "But there still existed the possibility of a reverter in the donor;" page 12, "Where the donor had but a bare possibility before."

Prof. Minor calls this a mere possibility of reverter.

If it be a right it is only what Chancellor Harper calls in *Adams v. Chaplin*, 1 Hill (S. C.) 268, a "right of possibility of reverter."

Inasmuch as all text-writers, including those who carelessly speak of a right of reverter, always use the term "pos-

sibility of reverter," when they are talking accurately and carefully, it is fair to assume that the latter phrase best describes the claim which the plaintiffs here set up.

A consideration of the real nature of this claim, of what it is and what can be done with it, will supply conclusions useful in the discussion, and will therefore be attempted at this point.

It must be remembered that the plaintiffs' claim is that they have an testate, inherited from Philip Reilly, an estate which he might have devised or granted, an estate as to which he died intestate and which was transmitted to them by descent. In other words, while they admit that what they have is not a reversion, their statement of its qualities shows that it is a reversion.

"A distinction is made, however, between a reversion, which is an estate vested in present, although to be enjoyed in the future, and capable of being transmitted by descent, devise or grant, and a mere possibility of reverter." 2 Minor, 420.

"A reversion is a vested interest or estate and may be conveyed," 4 Kent 354, "but if A has only a possibility of reverter as in the case of a qualified or conditional fee at common-law, he has no reversion." 4 Kent 353.

We can not agree with the suggestion which has been made, that this is an estate on condition. Here is no condition and no breach. No condition is expressed and none is implied. Without discussing this, it is enough to refer to Kent's lecture on Estates upon Condition, 4 Kent. Com. 122, from which much of the learning displayed in the decision of *Brattle Square Church v. Grant*, 3 Gray 142, is derived, and from which it will appear how foreign an estate upon conditions is in every respect from the estate devised by the will of Philip Reilly. Whatever possibility or right of reverter there may be in an estate on condition, a right which exists because of the condition, is not important here where we have no condition.

Words of condition render the estate liable to be defeated if the event expressed in the condition arises before the de-

termination of the estate or the completion of the period described by the limitation. 4 Kent. 126. There are no such words in the case at bar.

Nor is this a case of conditional limitation, because there is no limitation over to a third person if a condition be not fulfilled. This being neither a case of estate on condition or of conditional limitation, the case of *Brattle Square Church v. Grant*, which discusses only those estates, is not pertinent here. What we have here is a very different thing, a conditional fee. See 4 Kent 11.

We claim first that the estate devised to the trustees was an absolute fee-simple. If this be so, of course there was no estate remaining in the testator. The estate devised to the trustees was an absolute fee-simple, we say, because of the language of the will which repeatedly, clauses 2, 4, 9, 12, 14, 19 and 22, gives to the trustees all the testator's estate and all his powers with respect to it. The fourth clause empowers the trustees to do all acts in relation to the testator's estate as fully as he could do if he were in life.

It is nothing to the point to say, that the estate of the trustees will be limited to the purposes of the trust and the legal estate vested in them will be no greater than the equitable estate given to the beneficiaries. For here the purposes of the trust require that the trustees should have the fee, and the equitable estate in fee which the beneficiaries may take from the trustees requires that the legal estate in fee should be vested in the latter.

It is true as said in *Milhollen v. Rice*, 13 W. Va. 526, that if the estate of a tenant is expressly restricted to a life estate a superadded power to him to convey a fee does not create a fee, but as the same case points out, where the estate is not expressly restricted to a life estate, but is expressed in indefinite terms, such a superadded power operates to require the will to be construed to devise an absolute fee simple to the tenant. It will be well to observe here, for the failure to observe it has more than once misled the plaintiffs' counsel, that the children, William, Philip, and Mary Jane, have no estate, right or interest in the residuary fund. The trustees had the entire estate in that fund. The children might

receive none of the income or all of the income, none of the principal or all of the principal, as the trustees in their uncontrolled discretion might determine. How can it be said in such a case that the estate of the trustees is measured by the estate given to the beneficiaries? Looking at it in another way these three children were not beneficiaries at all.

It was not a mere power to convey that was here given to the trustees. They had that power and more. They could not only transfer the fee to the purchaser from them, but they could transfer the whole consideration received from such a purchaser to any of the three children if they chose and so wipe out so much of the trust fund and end so much of the trust. The purposes of their trust contemplated that they might do everything with Philip Reilly's estate that he could do, bestow all of this residuary fund on these three children, put an end to Philip Reilly's estate and their own estate in this property by transferring it to these children. Such purpose could only be effectuated by putting the fee in the trustees. The same considerations apply if we consider these childrens' children as the beneficiaries spoken of. If any estate should remain in the trustees at the death of the longest liver of the three children, the fee of the residuary fund was to go to the children and descendants of those three children. And for this, the final purpose of the trust, there was the same necessity that the trustees should have the absolute fee simple. This it was the plain intent of the testator throughout his will to give them. The intention of the testator must prevail. The manifest intention must have effect unless some rule of law is violated thereby. *Hinton v. Milburn*, 23 W. Va. 166, 171.

It has been said that whether the trustees have a fee simple or not is immaterial, since it is agreed that their estate will be determined by the death of Mrs. Carney, childless. It is immaterial whether their absolute fee simple estate may be determined by the happening of a contingency, but it certainly is not immaterial whether that estate is a fee simple or not, because if they have a fee simple that puts an end to the plaintiffs' claim of an estate remaining in the testator's heirs, for if the testator parted with the fee simple

his heirs could have neither reversions or reverter, right of reverter or possibility of reverter, nor anything else.

The same conclusions follow if the estate devised to the trustees be considered as a fee qualified, base or determinable. In such case, under the statutory provisions of this State, there is no estate remaining in the grantor.

We must first consider, however, whether there can now exist in this state even a possibility of reverter, and involved in that is the question whether there may now be in this state a qualified fee. This question has been thoroughly examined by Prof. Gray in his work on the Rule Against Perpetuities. The conclusion to which he comes is that a possibility of reverter can not exist in West Virginia, or indeed in any state except in Pennsylvania and South Carolina, sections 31, 24, 39, or in England. *Id.* section 23. Possibilities of reverter are not valid interests. *Id.* sections 34 to 37.

In Pennsylvania tenure exists, and a qualified fee may be valid. *Id.* section 38. But in the other states there is either no tenure or the statute *Quia Emptores* is in force and in neither case can there be any possibility of reverter. Section 39.

But if we concede that the fee devised was not absolute, but only conditional at common-law, and that such conditional fee might now exist in this state, still no reversion remained in the donor "because the grantee of such an estate was considered as having the absolute property of it and the donor had only a possibility of reverter, not an actual estate in reversion." 1 Lomax Digest 603.

The interest abiding in a grantor of a qualified or defeasible fee or of an estate in fee to a corporation is not a reversion which is an estate, but the possibility of a reverter. *Id.* 604.

A conditional fee at common-law was by the statute *De Donis* turned into an estate tail and then a distinct estate in reversion arose in the donor. 1 Lomax 503; 4 Kent 353.

Our statute has turned an estate tail into an absolute fee-simple, thus wiping out the reversion. This is an estate in fee conditional, 2 Minor's Inst. 78; it was to go to the children and other descendants of William, Philip, and Mary

Jane. This estate in fee conditional was converted into an estate tail by the statute *De Donis*, 2 Minor's Inst. 78.

On the 7th day of October, 1776, this fee conditional would have been an estate tail, but by the Virginia Acts of Assembly of 1776 and 1785, the provisions of which are retained in our Code, chapter 71, section 9, such an estate shall be deemed a fee simple.

So if we consider this a fee conditional at common-law, instead of a fee simple absolute, still we find that by reason of the statute adverted to this has become and is a fee simple absolute. Having devised a fee simple absolute, there could have been no reversion or even possibility of reverter in the testator or his heirs.

The last clause of this section has been referred to as intimating that there may be a reversion after even a fee simple. That clause is as follows: "And every limitation upon such an estate shall be held valid, if the same would be valid when limited upon an estate in fee simple created by technical language." The words "fee simple" can not here mean absolute fee simple, such as we claim to have passed by Philip Reilly's devise to the trustees. That would be a contradiction in terms. If the whole estate was devised, no reversion could remain, and so Judge Hoffman says in *Ochiltree v. McClung*, 7 W. Va. 245. "It may be remarked that in one of the provisions before quoted, there is a reference to an estate limited upon a fee simple. The limitation of a fee absolute to one person and an estate over to another is a contradiction. A fee qualified or conditional, or a less estate is necessarily implied in a limitation over" and the judge points out that there is authority for the use of the phrase "fee simple" as including not only fee absolute but fee qualified or conditional.

We can not claim that *Ochiltree v. McClung* is authority on this question, for all that is quoted by either Mr. Russell or myself is *obiter dictum*, the only question for decision in that case having been whether an appointment by writing witnessed by two persons was good under a will which required such appointment to be witnessed by three, a question which certainly did not call for the discussion we find in the report.

But what Judge Hoffman says is instructive and reasons strongly with us. Remember that we do not deny that the residuary fund will revert at Mrs. Carney's death, and will then vest in the heirs of Philip Reilly, then living. We claim that it will revert, but will do so at Mrs. Carney's death and not before then—that it will vest then and not before then. Plaintiffs, on the other hand, claim that it always remained in Philip Reilly during his life and vested in his heirs at his death. The Judge says, 7 W. Va. 246: "The owner of land in Virginia might, before the Code took effect in 1850, or may now, by deed of bargain and sale, upon a valuable consideration however small, paid by the immediate bargainee, or acknowledged to be paid, convey, limit, and vest the legal estate to and in such bargainee, in fee, either for his own benefit or for the benefit of others, and, by the same deed, *on the happening of a contingent event*, divest the estate out of such bargainee and vest it in another person; whether at the time of the execution of the deed the latter is ascertained or in existence, or not: Or, the owner may, by the deed, reserve to himself, or confer on the bargainee, trustee, or other person, a power to revoke and appoint the estate, and provide that *upon such revocation and appointment* the estate *shall rest* in the appointee: And in the former case, *upon the happening of the contingency*, and in the latter, *upon the proper execution of the appointment*, according to the provision in the deed, the estate—legal as well as equitable—*will rest* in the party named or described in the deed of appointment: Or the owner may, by the deed, provide that *upon a contingency or the failure to appoint*, the estate *shall determine* in the immediate bargainee for his own benefit or in trust, without declaring its further destination: And *in the latter case* the estate *will revert* to the bargainor or his heirs."

In all these cases, as appears by the language of the judge, the estate devised must determine before there is any reversioning or vesting. The estate here devised will determine of course only with the death of Mrs. Carney.

Of course it is impossible that that which will not vest until Mrs. Carney's death could have been inherited from

Philip Reilly, and it is just as impossible that a possibility of reverter could be conveyed, devised or inherited. It may be released, but it can not be alienated.

This brings us to consider whether such a possibility of reverter may be alienated. When valid possibilities of reverter existed, they could not be alienated. Gray on the Rule Against Perpetuities. Sections 13, 14. That means that they could not be granted, devised or inherited.

Upon the question here involved and which presents itself in various forms, the case of *Adams v. Chaplin*, 1 Hill (S. C.) 265, referred to by the Circuit Court, is precisely in point. Two opinions appear in the report, one by the chancellor and one by the appellate court. They reached the same result, differing only upon the question whether a conditional fee can merge in the possibility of reverter. It will be remembered that South Carolina is one of the two states, according to Prof. Gray, in which a qualified fee, and therefore a possibility of reverter, may exist. Both these opinions accord with our claim as to the time when anything shall vest in the heirs of Philip Reilly, and as to the nature of a possibility of reverter. Thus the chancellor says page 268, "At the death of John Chaplin, the elder, his son John, was his heir at law, and the right of possibility of reverter, which his father had in the land, is supposed to have descended to him. On the part of the complainants, it was argued that those must take who answered the character of heirs of John Chaplin, the elder, at the time the estate of John Chaplin, the younger, determined; according to the rule laid down by Cruise, in his Treatise on Real Property, 3 Vol. 412, tit. XXIX, chapter IV 2, 'that where a person entitled to an estate in remainder or reversion, expectant on a freehold estate, dies during the continuance of the particular estate, the remainder or reversion does not descend to his heir; because he never had a seisin to render him the stock or root of an inheritance; but it will descend to the person who is heir to the first purchaser of such remainder or reversion, at the time when it comes into possession.' 'Thus it was laid down by the court of King's Bench, in 34 Eliz., that of a reversion or remainder expectant on an estate for life, or in

tail, there, he who claims the reversion as heir, ought to make himself heir to him who made the gift or lease, if the reversion or remainder descend from him; or, if a man purchase such reversion or remainder, he who claims as heir, ought to make himself heir to the first purchaser.' The doctrine is very fully illustrated by Cruise, in the chapter referred to, and I have little doubt is applicable to the present case. Our act of distributions has so far altered the English law, that actual seisin is no longer necessary to enable one who has a present title to an estate, to become the stock or root of inheritance. It provides for distribution, 'when any person possessed of, interested in or entitled to real estate in his own right in fee simple,' shall die intestate. This, I suppose, would be held to apply to a reversion or remainder, after an estate for life, or an estate tail, if such were allowed in this country, because such a remainder or reversion is an estate of fee simple. But the authorities are, that the right of reverter after a fee simple conditional, is no estate in the land, but a mere possibility, and therefore it is, no remainder can be limited after the preceding fee. This right then, I suppose, is not affected by the act, but must go as at common-law to the person who can make himself heir to the grantor of the fee conditional, when that estate determines." Again he says on page 270. "The difficulty arises from what is said concerning the nature of the right which remains in the donor of a conditional fee simple—that is no estate or interest, but a mere possibility, which can not be granted or assigned. Co. Lit. 18a." And on page 271, he says: "Now the possibility which remains in the donor, after the grant of a fee simple conditional, is, certainly, in its nature, capable of being surrendered or released though not of being granted or assigned."

The court of appeals, speaking through O'Neill, say, page 276: "It seems to be agreed by all the books that a fee conditional is a fee simple." Again: "He that hath a fee simple conditional or qualified hath as ample and great an estate as he that hath a fee simple absolute; so as the diversity appeareth between the quantity and quality of the estate." 1 Co. Lit. (by Thomas, Am. Ed.) 583 18a. "From this

it would seem, that the only difference between the two estates, is as to the possibility of duration, but that as to quantity they are the same. The fee is in the tenant in fee conditional, subject to be divested on his death without heirs of his body; but it is an estate which descends from him to the heirs of his body."

And again, "from these authorities it seems to be clear that the whole estate is in the tenant in fee conditional, and that no estate is left in the grantor."

The court continue. "This brings us to inquire, what is the possibility of reverter? Is it an estate? I think not. For it has nothing like an estate about it. It is neither a present nor a future right. It is a mere possibility. Upon the happening of a condition the right may arise; but until then it is nothing but the mere remembrance of a condition upon which a present estate may be defeated, and a future one arise in any one who may be in *esse* and claim as heir to the donor. In the argument of Anthony Brown, one of the judges in C. B. in the case of *Willion v. Berkley*, speaking of the reversion under the *statute de Donis Conditionalibus*, it is said. 'For although the land should revert to the donor, before the act, this is no proof that he had a reversion, for an absolute fee simple shall escheat to the lord at this day, and yet the lord has no reversion. So the reverter of the land to the donor upon condition in law, does not prove that the donor had a reversion; for indeed he had no reversion, but the donee had the fee simple, and consequently the whole estate.' Plowd. 247. This opinion of Brown (who is described by Plowden, at page 356, to have been a judge of profound learning and great eloquence) contains the substance of all the learning on the subject, and shows most clearly that the possibility of reverter is not an estate. It is as he intimates, more like an escheat in possibility than anything else. Land may escheat for the want of heirs in the tenant in fee; but this possibility is no estate. No land may revert to the donor, on the failure of heirs of the body of the tenant in fee conditional; but until it occurs, there is neither right or possession, to be holden or inherited. It, however, is said, it can be released. This is true, and yet it

does not follow that it is an estate. A condition, as was very properly said in the argument, may be released, and this is exactly what is done, when the possibility of reverter is released. The condition upon which the land is to revert to the donor, is destroyed."

Upon the question of the heritability of a possibility of reverter, the court say: "To examine this as it should be, it is necessary to be satisfied, first, whether there is any such thing as a descent cast of the possibility of reverter. We have seen that it is no estate, and unless it is, it can not be inherited. The possibility of escheat to the lord paramount, in England, never was supposed to be inheritable. It is an incident of the estate granted, and upon failure of heirs, the land reverts in the lord upon office found. In the fee conditional, this land reverts and reverts in the donor or his heirs, the moment there is a failure of heirs of his body, by operation of law. Until this occurs, there is nothing to inherit. If it is inheritable, then it may be devised; for, whatever is the subject of inheritance, is the subject of devise. If that is so, the devise over to William is a devise of the possibility of reverter, and would not have descended to John, the heir and tenant in fee conditional. But it can not be devised. For an executory devise over, after a fee conditional, is too remote and can not take effect, unless it be accompanied with such words as will restrict the failure of the heirs of the body, to a dying without leaving issue, at the death of the first taker. *Mazyek v. Vanderhorst*, decided February term, 1828, at this place. If it can not be devised, it can not be inherited, seems to be the necessary consequence."

The case of *Outland v. Bowen*, 115 Ind. 150, is equally pertinent. The syllabus states the case as follows: "In 1855, B. executed a warranty deed conveying land to his grand daughter for an expressed money consideration. Following the description was written the stipulation that if the grantee should die, leaving no children, the land, or its proceeds that might be realized by sale or otherwise, should revert to the lawful heirs of the grantor; and, also, if the guardian of the grantee saw fit to sell the land, he could do so, by

appropriating the proceeds of the sale to the use of the grantee while she should live, and then applying the balance, if she should die without heirs of her body, to the heirs of the grantor. The grantee died in 1883, while in possession of the land, leaving no children, but leaving a husband and mother as only heirs at law."

"Held, that the estate created in the grantee is not an estate tail, but a conditional fee, liable to be defeated only by the two contingencies (1) that the grantee should die childless, and (2) that the grantor, prior to that event, should have died leaving lawful heirs competent to take the estate limited over."

The court say pages 153-154: "Of the estate created by the deed to Rebecca E. Bowen, we may say, primarily it was a fee simple, and, notwithstanding the condition subsequently written in the deed, the estate was liable to become absolute and continue perpetually in the first taker, her heirs and assigns. 1 Washb. Real Prop., pp. 61, 62. This creates in her a fee simple conditional, or a fee of a determinable or conditional character. *Smith v. Hunter*, 23 Ind. 580; *Clark v. Barton*, 51 Ind. 165; *Greer v. Wilson*, 108 Ind. 322; *Tiedeman Real Prop.*, § 26; *Gray Rule against Perpetuities*, § 14

"It was necessary that two contingencies should arise or exist concurrently in order that the estate created might be defeated. One was, that the grantee of the precedent estate should die without leaving a child or children surviving. The other was, that the grantor prior to that event should have died leaving lawful heirs competent to take the estate limited over. *Hennesy v. Patterson*, 85 N. Y. 91.

"The land was conveyed in fee to the first taker, and it remained uncertain until her death whether the estate conveyed would be defeated by the condition in the deed, or become absolute, and it could not be known until the death of the grantor, who would take as his lawful heirs. Since it was doubtful whether either of these contingencies would happen, the grantor created a fee in the grantee, and there remained in the grantor no future estate in reversion, but

only what is called a naked possibility of reverter. Tiedeman Real Prop., § 385."

And on pages 155 and 156. "It must follow, therefore, if there was no estate left in the grantor after the creation of the precedent estate, vested in the first taker, he would create no remainder, as a remainder can only be created out of the estate left in the grantor after the creation of the particular estate. After the conveyance of an estate in fee, whether the fee be base, determinable or conditional, there is nothing in the nature of an estate in the grantor out of which to create a remainder. It has, therefore, been laid down as one of the fundamental rules in respect to the disposition of real estate, that a remainder can not be limited to take effect after a fee; or, in other words, where there is no reversion there can be no remainder. Tiedemann Real Prop., § 398, and cases cited in note; *Huxford v. Milligan*, *supra*."

It was conceded for the plaintiff that at common-law a fee can not be limited after another fee, but it is said that that proposition does not aid us because the reason of the rule is that such limitation would transgress the rule against perpetuities. The rule has no such reason and needs none such. It is unnecessary to obscure this question by raising the dust from old books. It has nothing to do with perpetuities. There is a plain mathematical reason for this conceded rule. It is that after a man gives all he has he has nothing left. "Upon the grant of a fee simple whether absolute or qualified, there can be no reversion, for the fee simple is always the whole." 2 Minor's Inst. 420.

The reason referred to by counsel relates to executory devises as appears by *Brattle Square Church v. Grant*, and he can not be permitted to darken counsel by assigning it to a proposition which does not need it and with which it has nothing to do.

The plaintiff's counsel at one time stated his position in this way. "Remembering to limit and define the estate of the trustees by the equitable estate of the beneficiaries, let us see what estate was devised in the fund. William, Philip and Mary Jane, and the survivor of them, take the equita-

ble life estate in the fund. The remainder after this life estate was given to the 'children and other descendants then living of my three last named children or such of them as may have a descendent then living.' At the time of the testator's death, neither of these three children William, Philip and Mary Jane had any children or other descendants, and none have been since born. The devise then was of an estate for life in the fund with a remainder to persons not designated, not yet in existence, and who could not be determined until the death of the last survivor among the life-tenants. The remainder then was a contingent remainder belonging to the fourth of Mr. Fearne's Classes, 2 Min. Inst. 391-2; 4 Kent. Com. 207-208."

This statement is full of errors as we have already seen. William, Philip and Mary Jane did not "take an equitable life estate" in the fund. They had no interest in it whatever, being dependent on the uncontrolled discretion of the trustees. This is established by the decision of the Court of Appeals with respect to this will in a cause the parties to which were Mrs. Carney and the ancestors of the other plaintiffs on the one hand and the predecessors of these trustees on the other. This decision is not only authoritative because decided by the Court of Appeals, but is binding upon the present litigants because they were practically parties to it. In that case the Court says: "By no construction of the language used in the nineteenth clause of the will can it be held that the testator intended to give to the said William, Philip or Mary Jane, or to either of them any vested interest in the said residuary fund, or in fact any interest in said fund."

"By the fourteenth clause there is an absolute disposition of the residuary fund in trust for the children and other descendants of the said William, Philip and Mary Jane, living at the time of the death of the last survivor of the said persons. All the interest which the said William, Philip and Mary Jane could have in the residuary fund is dependent on the uncontrolled discretion of the trustees, and is therefore a contingent interest."

The devise in this will then was not an estate for life in the fund with a remainder, *etc.*, as claimed by the plaintiffs' counsel.

Nor is the question put by him "where was and where is the inheritance" at all troublesome. It certainly was and certainly is in the trustees. As is said in the case last referred to "there is an absolute disposition of the residuary fund in trust, *etc.*" Something has already been said by me in support of the proposition that the trustees took a fee simple absolute and I desire here to add only what is said on a similar question in *Outland v. Bowen*, 115 Ind. 157, 158, 159. "The rule that a remainder in fee can not be limited to take effect after an estate in fee, is especially applicable in case the grantee of the precedent estate has, as is the fact in the present case, a general power of disposition, thereby leaving the limitation over to operate only upon what is left at the death of the first taker. In such a case, the limitation over can not take effect either as a remainder or as executory interest. Tiedeman Real Prop. § 298 and note."

"Another and an independent reason why the limitation over is void and of no effect is, that the deed confers upon the taker of the precedent estate a general and unlimited power of disposition. This feature of the case need not be enlarged upon. As has been remarked, the deed created primarily an estate in fee in the grantee, subject to a condition, however, that upon the happening of a certain contingency the land, 'or its proceeds that may be realized by sale or otherwise, are to fall back,' *etc.* By necessary implication this conferred the power upon, and recognized the right of, the grantee, on arriving at the age of twenty one years, to dispose of the land. After conferring an unrestricted power of sale the attempt to hold on to or control the proceeds realized was futile. Whatever the intention of the grantor may have been, the power of disposition was fatal to the limitation over, the rule in such cases being that an absolute power of sale in the first taker renders a subsequent limitation over repugnant and void." *Gifford v. Choate*, 100 Mass. 343; *Hale v. Marsh*, 100 Mass. 469; *Ramsdell v. Ramsdell*, 21 Me. 288; *Jones v. Bacon*, 68 Me. 34; *Van Godder v. Smith*, 99 Ind. 404.

Any claim that the remainder in fee to the children or descendants of William, Philip and Mary Jane is a contingent remainder and not an executory devise is unfortunate in antagonizing another decision of the Court of Appeals with respect to this same will and to which the present parties are privy. *Whelan v. Reilly*, 3 W. Va. 612, where it is expressly considered to be an executory devise. It lacks one of the "distinguishing characteristics of a contingent remainder, there being" as has been already shown no "particular estate of freehold to support it."

If the plaintiffs' counsel had been right instead of wrong with reference to the existence of a life estate, still the consequence argued by him would not have followed. The fourteenth clause giving the fund to their "children and descendants," words of limitation and not of purchase, would have been a gift to William, Philip and Mary Jane, and the heirs of their bodies, and so would have created an estate tail which the statute would have converted into an estate in fee simple. *Moon v. Stone*, 19 Gratt. 130-327. It is obvious that the latter position taken by the plaintiffs' counsel sins even more than his earlier position against the rule forbidding such a construction as will work a partial intestacy. For if the plaintiffs' later proposition be right, a still larger estate in the testator's property was left undisposed of by his will. The Court will lean against such a construction, as has been already pointed out.

HOLT, PRESIDENT:

On appeal taken by Mary Jane Carney and others, plaintiffs, from a final decree of the Circuit Court of Ohio county, entered on the 9th day of June, 1894, in favor of John J. Kain and others, trustees, defendants, dismissing the bill without reservation.

The suit involves the will of Philip Reilly, deceased, late of the city of Wheeling, W. Va., especially the residuary fund created by the will, and whether the plaintiffs, Mary Jane Carney, the daughter of the testator, and the children of his son, John Reilly, deceased, are entitled to have that fund now turned over to them by the trustees under the will.

Philip Reilly, being the owner of real and personal property of the value of some one hundred and fifty thousand dollars, departed this life on the 24th day of June, 1866, leaving the will which gives rise to this controversy. On the 10th day of July, 1866, on motion of R. V. Whelan, the executor, the will was duly proved and admitted to record, and the executor gave bond, qualified and entered upon the discharge of his duties.

On two former occasions this will has been before this Court, where it will be found set out with sufficient fullness to determine its meaning and effect: (1) in the case of *Whelan v. Reilly* (1869) 3 W. Va. 597, where this Court, reversing the court below, held, *inter alia*, the will to be valid. (2) In the case of *Whelan v. Reilly*, 5 W. Va. 356, decided in 1872, where the Court, reversing the court below again, held the language of the fourteenth clause to be clear, the meaning of the testator plain, the will valid as not being inconsistent with any rule of law, and that the court had nothing to do but to see that the same was carried into effect.

Clause No. 1 made provision for the wife, to be taken in lieu of dower; but she died in the lifetime of the testator, and there is a residuary clause.

By clause No. 2 he devised and bequeathed all his estate, real and personal, to Richard V. Whelan, Henry Moore, and Charles W. Russell, of the city of Wheeling, as trustees.

By the codicil, Alonzo Loring was substituted as trustee in place of Charles W. Russell. Richard V. Whelan having died, Josiah F. Updegraff was appointed in his place, he having died, the present trustee, Thomas O'Brien, was, on the 26th day of April, 1876, appointed in his place; and, Henry Moore having resigned, John J. Kain was, on the 2d day of January, 1880, appointed in his place. All this was duly done in pursuance of clause No. 3, so that the present trustees are the defendants Alonzo Loring, Thomas O'Brien, and John J. Kain; Thomas O'Brien being also the executor *d. b. n. c. t. a.*

By clause No. 4 the trustees were given power (which might always be exercised by a majority) to sell, lease, con-

vey, manage, and dispose of his estate, and of every part thereof, and do all other acts in relation thereto, as fully as the testator could have done if in life, except so far as the exercise of such general powers would in any case defeat a particular intention or provision of the will. The trustees still have intact the Marshall county land, of three hundred acres, and the Glen run tract, of about two hundred and eighty acres. All the other property real and personal, except the one hundred acres devised to the children of his son John Reilly, has been converted into money, and invested as part of the residuary fund.

By clause No. 5 he provided for six of these plaintiffs, *viz*: the children of his son John, by setting apart for them by metes and bounds one hundred acres of the four hundred acre-tract situated in Marshall county. John is dead, and his children took it in fee simple; but he died after the death of the testator, and his personal representative is not a party to this suit, and he is not a necessary party, for the personal representative of the testator represents the personal fund so far as the children may come to have any interest. Here the will contemplates that the executor shall be subject to the order of the trustees, pay over to them, and in general manage as they direct. In such case the modern doctrine seems to be that the trustees deal directly with the beneficiaries, not only in paying legacies, but in making distribution of any part which goes under the statute of distribution.

By clause No. 6 he made a similar devise of the remaining three hundred acres of the Marshall county tract, to be held in trust in fee simple for the children of his son William. But William died in the lifetime of his father, never having married, and leaving no child or other descendant; and this executory limitation in trust to the children of William, who never came into being, became incapable of taking effect, and passed into the residuary fund, by the express language of the will as well as by operation of our statute of wills (Code Va. 1860, p. 574, c. 122, ss. 11, 14). And as the will, both as to real and personal estate, speaks and takes effect as if it had been executed immediately before the death of the testator, the second clause and twelfth clause of the will

operate to make it a part of the residuary fund, which was set aside to be held or invested in good and safe real estate securities.

The law is well settled that where a will expressly or by necessary implication directs land to be turned into money, and such conversion is necessary to carry out the special object of creating the fund, or the general scheme of distribution, equity will treat that which is directed to be done as already done, and treat the land, for purposes of devolution and the transfer of title, as already converted into personal estate.

The personal representative is the proper representative of the personal estate, and is a proper and generally a necessary party in a suit in which the court passes upon the construction of a will affecting a residuary fund not thereby disposed of. But this question of equitable conversion, if any, is not now deemed important, (1) because the trustees take all the property absolutely as active managing trustees, whose trust is to continue until all its feasible objects and purposes shall be accomplished; and (2) because, as to the property in question, regarded as that of the testator, it is agreed that defendant O'Brien is before the court both as executor *d. b. n. c. t. a.* and as trustee, and the limitations of an equitable estate created out of land and money are governed for almost all practical purposes by the same rules. Upon the doctrine of equitable conversion, see *Ackroyd v. Smithson*, 1 Brown Ch. 503; *Attorney General v. Hubbuck*, 13 Q. B. Div. 275, 289; and on equitable conversion by trustees or court, see *Steed v. Prece*, L. R. 18 Eq. 192; *Id.* Brett Lead. Cas. Mod. Eq. 61, notes.

By clause No. 7 the testator made an executory, equitable limitation in fee of the home farm, called the "Glen Run Tract," of about two hundred and eighty acres, to the unborn child or children of their descendants and the survivor whom his son Philip should leave at his death. After the death of the testator, and therefore after the will had ceased to be ambulatory, the son Philip died, unmarried and intestate, leaving no child or other descendants, so far as appears by this record. This executory equitable devise failing to

take effect the Glen run land, by virtue of the twelfth clause, passed into and became a part of the residuary fund. His next of kin are parties, but not his personal representative. This clause throws some light on the present question of partial intestacy, and the effect of section 13, chapter 77, Code, W. Va. p. 660 (Ed. 1891); section 14, chapter 122, Code Va. (Ed. 1860) p. 574. See *Hoke v. Hoke* (1878) 12 W. Va. 427, 465. Whether he ever claimed or attempted to sell or transfer any interest in this fund as coming to him by intestacy or otherwise does not appear in these pleadings.

By clause No. 8 it was provided that clauses 5, 6 and 7 should be so construed that if any one child of any one of his said three sons should attain the age of twenty one years, and before that time another child of the same son should have died, leaving a descendant, the descendant of the deceased should have the share which the deceased would have had if living. This has a bearing here as helping to show the general plan or scheme of the will.

By clause No. 9 he directs the trustees to sell all the rest of his real estate as soon as they should find it expedient, and convert all his personal estate into money. Both have been done, and the money has been invested as belonging to the residuary fund, appearing to amount on the 31st day of December, 1892, to the sum of forty one thousand nine hundred and fifteen dollars and sixty one cents, subject to certain deductions for compensation to the trustees and their agents, and perhaps for other things.

By clause No. 10 the trustees were authorized to sell at their discretion, to be exercised within two years, the Marshall county land, of three hundred acres, putting in its place in clause No. 6, his farm lying east of and near the city of Wheeling. But this substitution was not made, but the farm near Wheeling was sold.

Clause No. 11 provided for the investing of any money arising under the will to the amount of ten thousand dollars, to be invested in bonds of the state of Virginia, and to pay the income thereof to his daughter Mary Jane, the plaintiff, during her life, or until she should marry. In 1869 she married Philip Carney, who died on the 9th day of September,

1874. She has remained a widow, has never had any child, and, in the course of nature, can have none, being sixty five years old. In addition to the income from the ten thousand dollars in Virginia bonds and from the mansion house, *etc.*, of the home place, the trustees, from the 3d day of May, 1876, paid her six hundred dollars per year. Afterwards, by decree entered on the 30th day of May, 1884, by the Circuit Court of Ohio county in the chancery cause of *Mary Jane Carney v. Alonzo Loring et al.*, trustees, said trustees were directed to pay her twenty thousand dollars on or before the first day of July, 1885, and one thousand five hundred dollars per year during her natural life, out of the residuary fund, in lieu of the sum of six hundred dollars per year, the annual payments theretofore made to her by the trustees; the annuity of one thousand five hundred dollars to commence and be computed from the 1st day of July, 1884, including that day, and to be payable thereafter quarterly in advance. These payments the trustees have so far continued to make.

Clause No. 12 created the residuary fund now composed of the forty one thousand nine hundred and fifteen dollars and sixty one cents, already mentioned, and the two tracts of land, *viz.* the tract of three hundred acres in Marshall county and the Glen run tract of about two hundred and eighty acres above Wheeling on the Ohio river in Ohio county. This is the fund which plaintiffs claim they have the right to have turned over to them by the trustees, and pray that it may so be directed, and that it may be distributed between them in the proportions agreed upon and set forth in their bill. This right the defendants, in their answer, deny, alleging that no one has such right until after the death of the plaintiff Mary Jane, when, the objects of the trust having been fully accomplished, it would go, in equity, to those who might then be the heirs at law and distributees of the testator.

Clause No. 13 directed that the income from the residuary fund should become part of the principal until the death of the last survivor of his three children, William, Philip and Mary Jane, unless the trustees should think proper to apply any part of such income to the support and maintenance of

any or all of his said three children and families, but such application should be made only according to the uncontrolled discretion of the trustees. It does not appear, nor is it now necessary to ascertain, what if any, of such income, *etc.*, from the real estate, remains on hand. We have already seen that William died in the lifetime of the testator; Philip died soon after the death of his father; and that Mary Jane, the sole survivor, was paid twenty thousand dollars on the 1st day of July, 1885, and since that time has been receiving quarterly the sum of one thousand five hundred dollars per year.

Clauses Nos. 14 and 19 read as follows: "Fourteenthly. After the death of the last survivor of my three children, William, Philip, and Mary Jane, the said residuary fund shall be held in trust for the children and other descendants then living of my said three last named children, or such of them as may have a descendant then living; and all such descendants shall have equal shares, as among themselves, without regard to any difference in degrees of relationship or descent." "Nineteenthly. Notwithstanding anything hereinbefore contained, I desire to confer on the trustees power to encourage my three children William, Philip, and Mary Jane to conduct themselves well through life, and with that view do hereby authorize the trustees, whenever and as often as they shall think the same deserved by the good conduct of my said last named three children, or either of them, to advance and give to them, or either of them, any part or parts of the said residuary fund, whether principal or interest, in money or otherwise, without being accountable for the same to any person whomsoever, the power hereby given to dispose of the said residuary fund to or among my said three last named children, or either of them, being limited and controlled only by the discretion and judgment of the trustees."

Clause No. 15 gives to each son fifty dollars in discharge of any claims against the estate.

Clause No. 16 gives the trustees power to fulfill all the testator's contracts remaining unfulfilled at his death.

Clause No. 17 provides that the trustees shall not be responsible for the acts or omissions of each other, and shall respectively receive a reasonable compensation for acting as such trustees.

Clause No. 18 provides that the phrase "the trustees" shall be held to signify the persons who at the time referred to shall be the actual trustees under the second or third clause of the will, and that the act, *etc.*, of a majority shall be effective and binding.

Clause No. 20 refers to and provides for the execution of a deed of trust which was contemplated in aid of the trusts created by the will. I lay no great stress upon this clause, but it may have some bearing in the construction of the settlement created by the will as tending to show that he did not regard it as perfected, or in all respects, perhaps, completely declared, so that it might to some extent be regarded as an executory instrument, for in construing executory trusts in the sense of trusts not perfected or completely declared, the court exercises a large authority in subordinating the language to the intent. L. R. 4 H. L. 543. See *Lloyd v. Brooks*, 34 Md. 27; *Swan v. Frick*, *Id.* 139. For distinction between executed and executory trusts, see opinion of Mitchell, J., in *Gaylor v. City of Lafayette* (1888) 115 Ind. 423, 429 (17 N. E. Rep. 899); 27 Am. & Eng. Enc. Law, p. 12, note 1. But this executory clause is evidently confined to its own subject-matter and can, at least, have no direct apparent reference whatever to the residuary fund.

Clause No. 21 appointed Charles W. Russell executor, who never qualified.

Clause No. 22 authorized and required all questions of doubt or controversy arising under this will to be determined, adjudged and finally decided by the trustees. Counsel for defendants claims that this provision is valid, and that in this case, in view of the uncontrolled power and discretion in the premises vested in the trustees, effect should be given it. How far such a clause may be valid, and to what extent it may be given a controlling effect in the view here taken, can not arise, and is not discussed.

Clause No. 23 provides that no husband his daughter Mary

Jane might have should have any title to, interest in, or control over any property which might come to her under the will, or which she might receive through any power given the trustees. She married, as we have seen, and her husband is dead. The effect of the codicil has already been stated.

Plaintiffs claim that inasmuch as there is now no possibility of Mary Jane, the sole survivor, having children, or leaving any descendant—a fact conceded by defendants in their answer—they have a right to have this residuary fund turned over to them, and distributed, and this upon the principle acted upon in the cases of *Macomb v. Miller*, 9 Paige 265; *Male v. Williams*, 48 N. J. Eq. 33, (21 Atl. 854); and *In re Brown's Trust* L. R. 16 Eq. 239.

There is no controversy about the facts, but the defendants the trustees deny and resist such right, setting up in their answer (1) that their trust is an active and continuing trust, the purposes of which have not been accomplished, and can not be until after the death of Mrs. Carney, one of the plaintiffs; (2) because it will go to the heirs, *etc.*, of the testator living at her death, and who they may be can not now be known. The same reasons, so obvious, which prompted the giving of such full management and control of the fund to the trustees, in their opinion, still exist, and that it is in no way made manifest that such intention of the testator should not prevail. It was his to give, and therefore his to say when and how it should be given. That such intention that the trust should outlast the life of the longest liver is not ambiguous, nor are the trusts, so far as declared, in any respect ill defined, but they are expressed as clearly and made as certain as the nature of the subject-matter permits.

The scheme of the will as a whole, and the scope and tenor of each and every disposing clause, as well as the one here brought in question, show with a clearness too plain to admit of any reasonable doubt the intention of the testator to be that his children William, Philip, and Mary Jane were to take, as matter of right, no part whatever of the inheritance of the residuary fund, but that, as a reward of good conduct, and an incentive to its continuance—by that in good part no

doubt meaning a shown capacity and disposition of prudent management—the trustees were authorized, by express words set forth in the nineteenth clause, to advance and give to them, or to either of them, any part or all of the residuary fund, principal or interest, in money or otherwise, without accountability to any person whomsoever, and limited and controlled solely by their own discretion and judgment; so that, in the language of the Court in the case of *Whelan v. Reilly*, 5 W. Va. 356—the same will and the same parties, by privity of representation—“all the interest which William, Philip, and Mary Jane could have in the residuary fund was dependent upon the contingency of the uncontrolled discretion of the trustees.” No good reason is made manifest for taking out of the hands of the trustees the management of the fund while Mary Jane is in life, or for breaking in upon the general scheme of the testator, and frustrating, in whole or in part, his designs, by taking away from them the right to judge: and to control their discretion, and to compel them to give a child's part now to one who was not to take, as matter of right, any part of the inheritance in any event, or at any time, under the will. So far as distributing the fund now, in the lifetime of Mrs. Carney is concerned, the cases of *Macomb v. Miller*, 9 Paige 265; *Male v. Williams*, 48 N. J. Eq. 33 (21 Atl. 854); *In re Brown's Trust*, L. R. 16 Eq. 239; and like cases—are no answer, for here the trust is active, and for the reasons given is made to continue at least, until after the death of Mrs. Carney. But if it is a case of partial intestacy, as plaintiffs claim, then they may have a present right, subject to the power of appointment vested in the trustees.

It may be proper to say in the beginning that the common-law of England, including statutes of a general nature in modification thereof, and giving writs remedial and judicial, in aid of the common-law passed prior to the fourth year of the reign of James I. (1607) continues in force within this state so far as it is not repugnant to the principles of the constitutions of the state and of the United States, and laws made in pursuance thereof, and except in those respects wherein it was altered by the general assembly of Virginia

before the 20th day of June, 1863, or has been altered by the legislature of this state (see Code [Ed. 1891] article VIII, section 21, Constitution p. 41; and chapter 13, ss. 5, 6, p. 122) and where the common-law, by change of time and place, could have no application. The modifications made by statute bearing upon the questions here involved are contained in chapter 71 of the Code of West Virginia, in chapter 116 of the Code of Virginia of 1860; which, among other things, makes the conveyance of real estate lie in grant as well as in livery, and dispenses with the word "heirs," etc., or other words of limitation, to pass a fee simple. Our statute of wills, found in chapter 77 of the Code of West Virginia and chapter 122 of the Code of Virginia of 1860, provides as follows: "Every person not prohibited by the following section may by will dispose of any estate to which he is entitled at his death and which if not so disposed of would devolve upon his heirs, personal representatives or next of kin." Code, W. Va., c. 77, s. 1; Code Va. (1860) c. 122. Our statute of descents and distributions is found in chapter 78, Code, W. Va., and chapter 123, Code Va. 1860. It provides that when any person having title to any real estate of inheritance shall die intestate as to such estate, it shall descend and pass in parcenary to his kindred, to the classes and in the order named. Section 9 provides that when any person shall die intestate as to his personal estate, or any part thereof, the surplus, after payment of personal expenses, charges of administration, and debts, shall be distributed to and among the same persons, and in the same proportion, to whom and in which real estate is directed to descend, with certain specified exceptions. Section 24a, chapter 71, relates to the sale and conveyance of lands and estates therein conveyed in trust, with contingent interest in favor of persons unborn. Section 14 of chapter 122 of Code Va. 1849 (Ed. 1860) p. 574, is the one which may in part bear upon this case. It differs from section 13 of chapter 77 of Code of West Virginia (Ed. 1891) p. 660. See *Frazier v. Frazier's Ex'rs* (1831) 2 Leigh 642. The only statute of uses which has ever been enacted in Virginia or in this state is found in section 14 of chapter 71 of the Code of West Virginia, p.

634 (Ed. 1891) and in section 14, chapter 116, of the Code of Virginia of 1849 (Ed. 1860) p. 560. This provision has been at different times re-enacted, and as a separate section it yet remains in force. *Ocheltree v. McClung* (1874) 7 W. Va. 232, 238. See 1 Lomax, Dig. p. 219, side page 188. It will be noticed that it does not speak of wills. In *Bass v. Scott* (1830) 2 Leigh 356, it is said our statute does not execute uses created by will, we having no general statute of uses. (Cabell, J., pp. 358, 359). It is true that a court of equity may, on its own original principles, direct a trustee to convey the legal title to the *cestui que trust* whenever it may be proper that that shall be done, as in the case of a naked use; but this power is to be exercised according to a sound discretion, and the court ought to refuse to exercise it when, as in the present case, it was manifestly the intention of the testator that the management of the property should be at the discretion of the trustees, and not of the *cestui que trust*. See note of reporter, page 359. The revisers of the Code of 1849, with this case and the reporter's note before them, leave the section as it was, saying: "In the case of trusts created by will, it is so often the intention of the testator that the management of the property should be at the discretion of the trustees, and not of the *cestui que trust*, that there would be some difficulty in enacting a better rule than is laid down by the court in the case referred to." Revisers' Report, Code 1849, p. 605. The reporter who appended the note was Benjamin Watkins Leigh, who had so learnedly and laboriously prepared the revision of 1819. See preface to Code of 1819. Section 5 of chapter 71 reads: "Any interest or claim to real estate may be disposed of by deed or will." Up to the revision of 1849 we had an act against the sale of pretended titles, to be found in the Code of 1819, p. 375, taken from 32 Hen. VIII., c. 9, ss. 2, 3 (1541). In the revision of 1849 not only was omitted the old act against the sale of pretense titles, but, to make the law clear, section 5 of chapter 71 was enacted. See Report of Revisers of Code of 1849, p. 602. "The common-law idea of a partial as distinguished from an absolute, alienation of the ownership of land, opens the distinction between original estates and derivative estates. The

fact that several successive estates may be simultaneously derived out of one original, whereby it comes to pass that a derivative estate may be an estate not in possession, leads to the distinction between remainders and reversions. The fact that estates may be so limited as to take effect only upon the happening of a contingency suggests the distinction between vested estates and contingent estates, which last mentioned estates can only be remainders, because estates in possession and reversion are necessarily vested." Challis, Real Prop. c. 9, p. 49.

Personal property, although originally regarded, from the civil law standpoint of original absolute ownership, not partible in the common-law sense of the derivative ownership of land, has been gradually assimilated to some extent to the common-law idea of original and derivative ownership of real estate. And this drawing together is due in part to the fact that the ingenuity of conveyancers, operating upon the statute of wills and the statute of uses, and in disregard of the doctrine of abeyance of the freehold, has devised other prospective possibilities unknown to the common-law, as interests to arise at a future time, which are not estates, but which will be estates when they arise, and makes it necessary to distinguish executory interests from contingent remainders. See *Id.* And this view of giving personal property some of the qualities of real property, and real estate some of the qualities of personal property, is largely due to the creation of equitable estates by the conveyance and transfer of both kinds of the legal ownership to trustees in trust for the *cestuis que trustent*, accompanied with a power of appointment vested in the trustees, the equitable executory interests being created by executory devise, *etc.* In this way the term "vested" has come to be applied with almost the same meaning in reference to the ownership of both real and personal property, especially when applied to future limitations of equitable estates. The ownership, original or derivative, may be said to be vested when it has an abiding place, temporary or permanent, in an ascertained owner—vested in interest, when he has the fixed right of future enjoyment; also vested in possession when he has the present right of en-

joyment. It may be and is used with reference to the question of remoteness. It is also used in the sense of an ownership capable of transmission to another. See Gray. Perp. § 118; Hawk. Wills, 222, 223; Challis Real Prop. p. 56 *et seq.*; Fearné Cont. Rem. 218. But it is not in all cases the opposite of contingency. Contingent estates may be limited at common-law, and their distinguishing quality of contingency is conferred upon them by the terms of their limitation: (1) By a provision that the specified person shall not take unless the contingency shall happen; (2) that he shall not take until the happening of a future event; (3) contingent by reason that the limitation is in favor of a person not ascertained, or not yet in being.

Executory interests do not admit of being limited under the rules of the common-law. They owe their whole existence partly to the statute of wills and partly to the statute of uses. The limitations under which they arise are called "executory limitations," which in wills are executory devises, and in a deed are springing or shifting uses. In all essential characteristics these uses resemble what we now call "equitable estates," generally called "trusts." The legal estate in fee simple and absolute ownership vested in the trustee and the coterminous trust or equitable estate of the *cestui que trust* are regarded as being two separable things, presumed to be united in the holder of the legal ownership, but capable of separation, and having definite characteristics when separated. When separation takes place, the trust confers the right both to take the profits and also to call upon the trustee to make such conveyance and transfers thereof as the equitable owner shall think fit. Challis, Real Prop. p. 309. They follow the law of their creation, but in dealing with them equity generally follows the analogies of the law. Yet their history, the time when, and the chancellors under whom they originated, as well as their characteristic qualities, show that the elementary notion of them was borrowed from the Roman law. This is the accepted doctrine. See 2 Pom. Eq. Jur. § 976; 2 Story Eq. Jur. § 965; 1 Spence Eq. Jur. 439-442; 27 Am. & Eng. Enc. Law 4; Williams Real Prop. (17th Int. Ed.) c. 7, p. 192; Washb. Real

Prop. 384; Tied. Real Prop. § 438, 1 Bl. Comm. 19-80; 1 Bl. Comm. (Hammond's Ed.) Notes Ed. p. 40 *et seq.* But see 2 Pol. & M. Hist. Eng. Law, 228 *et seq.* 236; *Id.* Introduction. p. 31 *et seq.*

The chief characteristics of equitable executory interests here involved are: (1) They are with us still under the exclusive jurisdiction of courts of equity. (2) The distinction between real and personal property is reduced to a minimum. Personal property may be limited in the main, as though it were real; and real property is cut loose from the common-law prohibition of leaving the ownership of the freehold in abeyance; and of creating freehold interests to rise up and commence *in futuro*, and shift as a whole from one to another. Hence arises their great plasticity and ease with which they can be molded to meet the most complex scheme of disposing of property. Both are subject to the rule against remoteness. "They arise, when their time comes, as of their own inherent strength. They depend not for protection on any prior estates, but, on the contrary, they themselves often put an end to any prior estates which may be subsisting." Williams, Real Prop. 433.

As to the legal ownership in the trustee (1) it may be a dry, passive trust, a mere resting place for the legal title; (2) or, as in this case, it may be an active continuing trust, with the duties imposed of active management and control of the property. And a court of equity may direct a trustee to convey the legal title to the *cestui que trust* whenever by the language of the instrument, or in contemplation of the settlor, such management and control ought to come to an end. But this power of the chancellor is to be exercised according to a sound discretion; and the Court ought to refuse to exercise it when, as in the present case, it was manifestly the intention of the testator that the control and management of the property should remain with the trustees. *Bass v. Scott* (1830) 2 Leigh 356. Such instruments are frequently, as in this case, accompanied with a power to appoint and to sell and convey. Such uncontrolled discretion of the trustees is not to be interfered with, in the absence of bad faith (*Whelan v. Reilly* (1872) 5 W. Va. 356; *Gisborne v. Gisborne*, 2 App.

Cas. 300; and here none is charged, or in any way intimated.

The estate taken by the trustees is commensurate with the powers conferred and the purposes intended to be accomplished—in this case a fee simple absolute in fact as well as in name; no matter what period of time, if any, may be set for the ending of the trust. If, however, the trust is a dry one, or limited to await an event such as the death without issue of the beneficiary, and she has passed the age of child-bearing childless, as in this case, so that, without harm to any one, we may look forward and say that for all practical purposes, the event for distribution has come, it may be made. *Male v. Williams*, 48 N. J. Eq. 33 (21 Atl. 854); *Macomb v. Miller*, 9 Paige 265; *In re Brown's Trust*, L. R. 16 Eq. 239. And it is done or refused at that time in the exercise of a sound discretion. But, however the fact of passing the age of childbearing may bear on such a practical question, it has no bearing when we come to determining the quality and quantity of estates, and ascertaining rights and interests dependent on her actual death leaving no issue. In such cases the law considers that the possibility of issue continues so long as the person lives, no matter how improbable it may be from the great age of the party; for in such cases a possibility of issue is always supposed in law to exist, unless extinguished by death. For such purpose the possibility of issue is commensurate with life. See *Williams*, Real Prop. 115; 2 Bl. Comm. 126; Co. Litt. 40a; Litt. Ten. § 34; *Jee v. Audley*, 1 Cox 324; *List v. Rodney* (1877) 83 Pa. St. 483, 492. And the unborn devisee of an equitable contingent executory interest in fee simple absolute, limited by a contingency determinable within the rule against remoteness, and the estate limited not contravening such rule, will, as a matter of interpretation in contemplation of law, as a probable possibility, come into existence and take. For the will, as in this case, must be read and construed as we find it—a fact fixed by the death of the testator—and is to be read not by the light of subsequent events; and, if the unborn devisee does in fact come into existence, as well as in contemplation of law, we can not hold that he will take by purchase under the will as devisee that of which the testator died intestate. Nor will the

law intend that the testator meant to die partially intestate. Gaston, J., in *Vanhook v. Vanhook*, 1 Dev. & B. Eq. 589, 596.

I have said enough to justify the decree complained of, if, instead of being as it is, a final decree of absolute dismissal on hearing of all the equities and issues presented in the pleadings, it had been a dismissal without prejudice. Being a final unqualified decree presents another question of vital importance, it may be, to the children of John Reilly; certainly to those who may hereafter claim under Mrs. Carney; and that requires us to look further into the matters of law and fact presented by this record. This latter question has led to a learned and exhaustive discussion of the nature (1) of the estate in this fund created by the settlor; (2) the characteristics of base fees, qualified fees, fees on condition, conditional fees, and fees determinable, and conditional limitations generally, and the nature and peculiar distinguishing marks of what are called "possibilities of reverter," and "possibility of reversion," and their capacity to pass by alienation and descent. For a discussion of this general subject I now refer to Gray Perp. c. 2, § 5 *et seq.* 236, where this case, when first in this Court, is cited, among others, in the note. *Whelan v. Reilly* (1869) 3 W. Va. 597, 613; *Challis Real Prop.* p. 197 *et seq.*; 19 Am. & Eng. Enc. Law 1035, 1055, notes; *Ocheltree v. McClung* (1874) 7 W. Va. 232; *Minor. Inst.* (2d Ed.) 86, 87; *Willion v. Berkley* (1652) 1 Plow. 223, 244; *Proprietors v. Grant* (1855) 3 Gray 142, 148; *Purefoy v. Rogers* (1681) 2 Saund. pt. 2, pp. 380, 381.

What is the nature of this instrument? The testator gave all his property of every kind, the real estate in fee simple, the personal estate absolutely, as a residuary fund, impressed with individuality, to trustees, with power to do all acts in relation thereto as fully as the testator could do if he were in life; nevertheless in trust to execute the directions therein given, and carry out the purposes thereby declared. It was an active, continuing trust, and required the constant control, care, and management of the trustees until the purposes of its creation had been accomplished. The testator was induced to adopt this mode of disposing of his property: (1) To avoid some of the legal questions which have been so

learnedly discussed, among others that mentioned by Blackstone (2 Bl. Comm. 173.) The common-law, if it recognized the equitable estate at all, recognized it only as in coalescence with the legal estate; and, if we keep insisting on the equitable estate being vested in the heir at law until the unborn beneficiary comes into being, we are shackling the trust with a common-law idea, which it was the very purpose of the deviser to shake off and escape. He intended that the trustees should hold in trust for the unborn devisee, and not for the heirs. Why insist on anything being vested in the heir, who can only take, if at all, in the after-contingency, so remote and improbable that the testator did not deem it necessary to provide for it at all? And as to the income in the meantime, the beneficiaries took that under the uncontrolled discretion of the trustees, and not as a matter of right. (2) To render such estate plastic, easily and safely molded to fit future contingencies, and carry out his general scheme of disposing of his property. (3) And, perhaps mainly, to provide for his children a comfortable maintenance and support during life, without subjecting his property to the hazard of being dissipated and wasted by their improvidence, and to put it in the power of the trustees to reward good conduct, and to hold out inducements for its continuance. He had unbounded faith in the fidelity of his trustees and in their practical good sense and capacity to control and manage judiciously the property in the interest and to the benefit of the objects of his bounty, who were, as to ultimate ownership, his grandchildren and their issue. His children were to take nothing except under the power of appointment. And the power given the trustees, within the purposes of the trust, "was limited and controlled only by their discretion and judgment." *Whelan v. Reilly* (1872) 5 W. Va. 356-357 a case in which the same will came in question between the same parties or their privies.

So far as this record shows, no one had a right to complain of being stinted, for Mrs. Carney received out and out the sum of twenty thousand dollars at one time, and, in addition, is now receiving an annuity of one thousand five hundred dollars, equal to a six *per cent.* income from a sum of twenty

five thousand dollars. But the question remains, did the testator fail to dispose of any part of his ownership, or does the will create a resulting trust in the nature of a possibility of reverter to his heirs at his death, and if so, what is the nature and effect thereof?

First. As to the personal part of the residuary fund, it can not be a conditional fee, changed by the statute *de donis* into a fee tail, and the latter, by our statute, converted into a fee simple; for the word employed by the statute of entails is "tenement," and mere personal chattels are not entailable (2 Minor Inst. 78 (88); and so our statute docking entails deals only with estates in land. Code W. Va. c. 71, s. 9; Code Va. 1860, c. 116. This fund, however, created by the will, is given an individuality apart from the portions of the estate which compose it—see *In re Kenyon*, 17 R.L.149 (20 Atl.294)—and comprises the two unsold tracts of land and forty one thousand dollars odd in money, which also comprises an uncertain amount of rents and income from these lands, which amount does not now appear.

Second. There can be no conditional fee in the land, for no estate therein, as has already been seen, is given to the children William, Philip and Mary Jane, either expressly or by any necessary implication; and for a fee conditional there is but one condition, namely, that the grantee shall have issue or heirs of his body. 2 Minor Inst. 78 (87). The conditions admissible for the purpose of creating a conditional fee are restricted to a single type, which always takes the form of a limitation expressed to be to the heirs of the body of the donee or donees, either generally or to a special class of such heirs. The word "heirs" limits a fee or estate of inheritance, while the imposed restriction prevents the fee from being a fee simple in the proper sense of the term. Challis Real Prop. pp. 44, 209. He did not intend the issue or descendants of his grandchildren to take through his children, but required both grandchildren and their descendants to be then living, and to take directly and immediately from himself. Therefore there is no fee tail to be turned into a fee simple. This gift, is therefore, in form and effect, a fee simple absolute, determinable in the sense that it is future

and contingent, and may never vest in interest, because the donees are unborn, and may never come into existence. But this modifying quality is not expressed in the limitation fixing the quantity of ownership, but is only implied from the nature and circumstances of its origin as a gift to an unborn donee. It is not a condition subsequent which may defeat a fee simple already vested, but is rather of the nature of a condition precedent, not to the creation of the future estate, but precedent to its vesting in interest or in possession. This contingency is itself determinable within the rule against remoteness, and, so far as it bears upon the question of partial or total intestacy, it will itself, in contemplation of law, determine or end; that is the unborn donee will in all likelihood for some purposes come into existence; and in this light it must be regarded in construing the will, and not by the light of subsequent events. I need not stop to give it a name. I have given its characteristics as I now see them, and its necessary effect in preventing partial intestacy. Section 8 of chapter 71 of the Code makes this devise without any words of limitation a devise of an equitable interest in fee simple to the same extent as if the deviser had added the first sentence in Litt. Ten. (1475) "to hold to him and his heirs forever." It can not be a remainder of any kind or a reversion in any proper sense, for they are respectively but parts of one whole; the one created by the parties, and the other by operation of law. Nor do sections 12 and 13 of chapter 71 of the Code change this character of a remainder, but they only provide that it shall not fail for want of a particular estate. Therefore this equitable, executory future interest in trust, created by this executory devise, exhausts all the equitable ownership that it is capable of; is commensurate with and rounded out to the full measure of the fee simple and absolute ownership conveyed and transferred to the trustees. This seems to be comprehended in and to be inferred from the view taken of this will in *Whelan v. Reilly*, 5 W. Va. 356, in which this same will was then before the Court and, it seems, between the same parties or parties in interest, their privies in right or in representation. In that case the majority of the Court say (page 375): "When the language of

a testator is plain, and his meaning clear, the courts have nothing to do but to carry out the will of the testator if not inconsistent with some rule of law. By no construction of the language used in the nineteenth clause of the will can it be held that the testator intended to give to the said William, Philip or Mary Jane, or to either of them, any vested interest in the residuary fund, or in fact any interest in said fund. By the fourteenth clause there is an absolute disposition of the residuary fund in trust for the children and other descendants of the said William, Philip and Mary Jane living at the time of the death of the last survivor of the said persons. All the interest which the said William, Philip and Mary Jane could have in the residuary fund is dependent on the uncontrolled discretion of the trustees, and is therefore a contingent interest."

This brings us to what the books call a "possibility of reverter," which has been so fully and ably discussed. See 2 Minor Inst. 420; 1 Lomax Dig. (2d Ed. 1855) 603 *et seq.*; 4 Kent. Comm. p. 10 *et seq.*, 354 (381); 2 Bl. Comm. 174, 175; 1 Washb. Real Prop. (4th Ed.) p. 90; Tied. Real Prop. (2d Ed.) § 385 *et seq.*; Gray Perp. § 13; Challis Real Prop. 58, 63; 19 Am. & Eng. Enc. Law 1028, 1055, note; *Proprietors v. Grant*, 3 Gray 142; *Society v. Boland*, 155 Mass. 171 (29 N. E. Rep. 524); *Scheetz v. Fitzwater* (1847) 5 Pa. St. 126; *Id.*, 2 Shars. & B. Lead. Cas. Real Prop. 11, notes 17; *Ocheltree v. McClung* (1874) 7 W. Va. 532; *Willion v. Berkley* (1562) 1 Plow. 223, 244; 2 Pol. & M. Hist. Eng. Law, c. 4, § 1, pp. 21, 23. The freehold estate in right of present enjoyment, in possession, will come back by operation of law. In the case of remainder this residual ownership has also gone out of the donor; but to stay out—remain away—is not to come back, but goes to another. Possibility of reverter denotes no estate, but, as the name implies, only a possibility to have an estate at a future time. Of such possibilities there are several kinds, of which two are usually denoted by the term now under consideration. (1) The possibility that a common-law fee may return to the grantor by breach of a condition subject to which it was granted; and (2) the possibility that a common-

law fee other than a fee simple may revert to the grantor by the natural determination of the fee. Since every remainder and every reversion is a part only of the estate of the grantor or settlor, it follows that by the common-law no remainder can be limited in expectancy upon the determination of a fee, and that no reversion can remain in a grantor or settlor who parts with a fee. There can not exist two common-law fees in the same land. *Co. Litt. 18a; Willion v. Berkley*, 1 Plow. 223, at page 248, and authorities cited in the margin. In regard to a fee simple and a determinable fee this proposition has never been disputed. *Challis Real Prop.* 63. But by executory devise it has been, since the statute of wills, possible to limit a fee simple upon the determination or in defeasance of another fee simple. *Id.* It remains, therefore, in the trustees, awaiting the event fixed for vesting in the unborn beneficiaries. During that time it needs no other abiding place than with the legal fee simple absolute. Then, if no one of them is in existence, it arises in its integrity as a vested interest for those who may then be entitled as of right, for the natural inherent determinable quality of such a gift by executory devise relates to and operates upon the fund as a whole, and not upon any part of the ownership, such as a possibility of a right. Section 14, chapter 122, Code Va. 1849 (Ed. 1860) p. 574, may be thought to have some bearing, for the testator died in 1866. It reads as follows: "Unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised in any devise in such will which shall fail or be void or otherwise be incapable of taking effect shall be included in the residuary devise (if any) contained in such will." To this the Code of West Virginia adds: "And if there be no residuary devise therein, such real estate or interest shall go to the heirs at law of the testator as if he had died intestate." Code W. Va. (Ed. 1891) c. 77, s. 13, p. 660. This addition was made by act of 9th March, 1882. See Acts 1882, p. 196, c. 84, s. 13.

The chief object of section 14 of chapter 122 of the Code of 1849 (1860) was to modify the doctrine of lapse, and substitute residuary legatees for the heirs of the testator where there is a residuary devise. *Haymond, J., in Hoke v. Hoke*

(1878) 12 W. Va. 427, 472. See 1 Jarm. Wills (Bigelow's 6th Ed.) c. 11, side pages 307, 309; *McGreevy v. McGrath*, 152 Mass. 24 (25 N. E. Rep. 29.) The statute in question (section 14, chapter 122, Code 1860) was taken from St. Vict. 1 c. 26, § 25. See 1 Jarm. Wills, side pages 321, 322. See 3 Lomax Dig. (2d Ed.) side page 114, top page 188; 2 Minor Inst., top page 1057, side page 947, as to lapse. In 1 Jarm. Wills, top page 336, it is said the doctrine of lapse is properly extended to the case of gifts on contingency. See 2 Woerner, Adm'n 911. Here the devise in question was of the residuary fund itself, and therefore this statute can have no application. This, however, leaves such possibility of the contingent resulting trust to go to his heirs at law at the testator's death, to become an executory interest vested in right of possession in such heirs as may be living, and therefore able to take in the event of the devise to the unborn donee being thenceforth incapable of taking effect by his failure to come into being on the event prescribed; and then, and not before, such interest goes to the heirs at law of the testator as if he had died intestate thereof, meaning by necessary implication, that it did not fail to take effect by reason of partial or total intestacy. For the law as it now is, see Code (Ed. 1891) p. 660, c. 77, s. 13. The heirs at the death of the testator had no present interest vested in right. There was a possibility of the happening of a future event, which, if it should occur, would then give birth to some right or interest in them. It was a present possibility of a future executory interest coming to them as a whole. Such was its character, whatever we may call it, whether it was then vested in the sense of being transmissible or for any purpose, such as having a right to look after it in a court of chancery, or to sell for a valuable consideration, subject to the doctrine of relief given to expectant heirs against unconscionable bargains is the ultimate question. It may be called a possibility of a right of reversion in the trustees, a contingent, executory resulting trust to them for those who can show themselves entitled to take in case the unborn donee is not in existence in the given event; and it comes and goes, as a whole, after the manner of executory interests, if it goes at all, for this

was their characteristic in the beginning, lying at the foundation of the whole doctrine; and it remains so to this day, giving them their great capacity of being molded to any desired form and consequent adaptability and convenience.

There is another view that might perhaps be suggested in order to give effect by necessary implication in such a will to the partly, but imperfectly, expressed intention of the testator, without running counter to the restraint imposed by the maxim, "*Voluit sed non dixit.*" I give it, and must confess that it would impress me with great force if the tendency of our decisions were not strongly against applying the doctrine of implication in such cases. The scheme of this will excludes the heirs of the testator who may be living at his death in every instance in favor of his issue who may survive and be in existence when the given event happens. Such is the scheme of the fifth clause in favor of the children of John. It is to be held in trust for the then and thereafter born children equally in fee simple, and to the survivor or his issue attaining the age of twenty one. The same plan is followed in the sixth clause in favor of the children of William; in the seventh clause in favor of the children of Philip; in the eleventh clause in favor of the children, *etc.*, of Mary Jane living at her death; and when we reach the fourteenth clause—the one disposing of the residuary fund—we find it going to those descendants of William, Philip, and Mary Jane living at the death of the last survivor of these three. So that we find that each disposing clause, including the fourteenth, which disposes of the residuary fund created by the twelfth, and kept in accumulation by the thirteenth clause, follows this same general plan, which shows clearly the design that the testator's children were to take nothing except what should be given them in life under the uncontrolled discretion of the trustees, with the exercise of which the Court will not interfere in the absence of bad faith. Thus we see that throughout the will as a whole, and in each and every disposing clause, including the one in question, such general and predominant purpose stands out in plain view. Why, then, does not the necessary implication arise of a devise to his then living heirs in the event of the unborn donees not

coming into existence, and that they are to take "without regard to any difference in degree of relationship or descent?" The exclusion of William, Philip, and Mary is plainly expressed. Is not this implication necessary as a component part of the will? See *Bartlett v. Patton* (1889) 33 W. Va. 72, (10 S. E. Rep. 21); *Graham v. Graham* (1883) 23 W. Va. 46. There is no such deficiency of expression as to compel the construction of a partial intestacy, as the intention to dispose of the whole clearly appears. See *Trust Co. v. Coffin* (1890) 152 Mass. 95 (25 N. E. Rep. 30) and 8 Lawy. Rep. Ann. 749. notes. Therefore it may be said it is not a case which rests on conjecture of what we infer the testator would have said had he gone further and said more, but it is a case of plain intention to dispose of his whole property, as shown by the creation of the residuary fund, and by his will, taken as a whole. In contemplation of law he had a right to suppose that some of the ultimate beneficiaries would come into existence, and, if they did not, that those of his heirs who were then living would take by express words, helped out by necessary implication, without embarrassing his will by alternative express dispositions to meet such a remote contingency. If the declarations of trust as to the residuary fund could be regarded as in any degree incomplete, executory, then I have no doubt the correct view would be for the fund to go *per capita* by purchase under the will to the heirs, *etc.*, of the testator living at the death of the last survivor of William, Phillip, and Mary Jane, no unborn donee having come into existence.. But, for reasons already given, I do not regard the declaration of trust as incomplete. Such an alternative limitation can not be implied from a provision that the three children shall not take, for, unless the testator meets the contingency of its failing to take effect by giving it to some one else (*Boissieau v. Aldridges*, 5 Leigh 222), it results to the heirs at law in analogy to descent cast. Here the testator has given no intimation, direct or indirect, that he had in mind such a contingency. He has certainly not met it by an alternative executory devise to any one else. Nor has he, in express words, said that the heirs should in no event take, which might perhaps have prevented a resulting trust to arise to them. See

Attorney General v. Green (1789) 2 Brown Ch. 492; 2 Crabb Real Prop. § 1794. Thus we have seen that the legal ownership and estate in fee simple absolute and in ownership absolute is expressly devised to and vested in the trustees for the clearly manifested purpose, among others, of cutting off all likelihood of partial intestacy. The corresponding equitable trust estate is also in the trustees, and the two are presumed to abide there in union until the time comes for the trust estate to spring up and vest in title or in enjoyment, as the case may be. In the meantime the trust estate is marked out, and is capable of separation, and so will have definite characteristics when the time to separate comes; and when such separation and vesting does take place, such vested ownership of the trust will confer upon the *cestui que trust* the right to the rents and profits, and also the right to call upon the trustees to convey the legal title as the equitable owner may direct, subject, however, to the doctrine laid down in *Bass v. Scott*, 2 Leigh 356, relating to active continuing trusts. In devolution of ownership it then follows the statute of descents and distribution. In its creation it is not complicated with the doctrine of abeyance of the freehold, or the common-law prohibition against creating freeholds to commence in the future, for neither applies to such an instrument, the fundamental idea of which is to comprehend real and personal property as near as may be in one and the same limiting words in the same disposing clause; and to cause the equitable ownership to abide its time in the trustee, and to rise up or shift as a whole when the event prescribed shall happen, provided it does not contravene the rule against remoteness. In other respects it follows the analogy of legal ownership. Here the equitable ownership of the trust fund as created and declared by the deviser is coextensive in quantity and runs parallel with the legal ownership in the trustees; but it is liable to be prevented from ever rising up and vesting in title to any right of ownership by reason of the inherent quality of being given to one designated, but not yet in existence. This quality is in the nature of a condition precedent, but technically it is not such, because it is not express, but mainly because we are in a court of equity dealing with trust prop-

erty. So far as it is an executed trust exhaustively created and declared, we take it as we find it at the death of the testator, uncontrolled and unqualified by the current of subsequent events; but, so far as the instrument is incomplete, executory, we should pursue the manifest intention of the testator to the end as near as may be. In this view, and in the event supposed, the donee not having come into existence, a resulting trust for the first time separated from the legal ownership, and for the first time vested, would spring up and vest in the then heirs, *etc.*, of the devisor.

The law of this case and of cases like it shows that the division into vested and contingent is not exhaustive. See Challis, Real Prop. p. 56. As to the origin of the use of the term, see 2 Pol. & M. Hist. Eng. Law, p. 85. Nor is vested always the opposite of contingent or of executory, nor does the fact of vested or non-vested always determine the question of transmissibility; especially under our statute of wills and descents. And under section 5 of chapter 71 of the Code, which reads, "Any interest in or claim to real estate may be disposed of by deed or will," that which descends may be devised, and generally that which may be devised may be sold and conveyed. The word "vested" had originally no reference to the absence of contingency. Hawk. Wills 221; Gray Perp. p. 62, § 99. See *Id.* § 11, note 2. So that it by no means follows that because an estate is contingent, therefore it is non-transmissible; for many contingent remainders and contingent executory interests are transmissible by descent, and if so, they are alienable by will and by deed. In fact, such would seem to be the general rule under our statutes. Contingency does not necessarily negative transmissibility. It is in a state of contingency and doubt whether it will ever go to any one save the unborn devisee, but if it does not go there, by reason of his not coming into existence, then, by reason thereof, the interest in the fund comprised in such devise has become, by an event after the death of the testator, incapable of taking effect. By law it then comes by descent, as a right now vested in possession, to the heirs of the testator then living. As a possibility of a resulting trust, coupled with an interest, it had come to the heirs of the testator living at his

death. Such possibility came to an ascertained class, but one liable to open and let in others before the contingent and future event giving the right of enjoyment might happen. During this period of suspension this possibility of a resulting trust to the heirs and a contingent executory interest to the unborn devisee remains with the legal title, awaiting the prescribed event which is to determine, within the rule against remoteness, where the contingent interest will go as a fixed right of property. And during this period of doubt and suspension of vesting fixed by law as not unreasonable, and not against public policy, the equitable ownership has its true and only abiding place with the legal ownership, vested for that purpose, among others, in the trustees. And in this lies the fundamental principle and consequent simplicity, flexibility, and convenience of this mode of alienation; and the attempt to import into it and go by the irreconcilable common-law rules and principles of contingent remainders can but result in producing confusion and uncertainty.

If this view is correct, there is no partial intestacy, no such want of express language of disposition as to leave any part of the ownership of the residuary fund undisposed of, although the testator left a remote contingency which could only be met by the law of descents. This we have called the possibility of a resulting trust, and although such possibility was no part of the equitable ownership, yet depending upon the contingency of the unborn devisee not coming into being, it is said to be coupled with an interest, and therefore belonged to the heirs of the testator living at his death—might have been granted, assigned or devised by them, and under our statutes of descents and distribution would pass to their heirs or personal representatives—for a man may have a possibility of reverter where no remainder can be limited (see *Gray on Perp.*, p. 22), and in this State (Va.) it has been thought that a right of entry was devisable under our Statute of Wills. See opinion of Green, Judge, in *Watts v. Cole*, 2 Leigh 653, 664 (1830.)

The decree complained of would have been right if it had said that on final hearing of the equities plaintiffs were not

then entitled to the relief prayed for, followed by a final decree of dismissal, but without prejudice. Such correction could now be made, and the decree thus corrected be affirmed. Such is the usual course. But it is likely that the trustees desire henceforth to act under the guidance and direction of the Court, and to make a settlement of their accounts; and the plaintiffs have in their pleadings laid the foundation for taking such account. It seems proper that this cause should be retained in the Circuit Court for all proper relief if the parties see fit to ask it.

The decree complained of is therefore reversed, with costs against the fund, and the cause is remanded for further proceedings.

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ABATEMENT OF LEGACIES. See *Wills*, 4, 5.

ACCOMMODATION PAPER. See *Negotiable Note* 1.

ACCOUNTING.

A court will not undertake to adjust the rights of parties without satisfactory means of ascertaining what their rights are, and when an account can not be safely stated, and the true balance between the parties ascertained. *Hinkson v. Ervin* 111.

ACTION BY ASSIGNEE. See *Insurance Policy* 1, 2; *Assignment of Chose in Action* 1.

ACTION ON BONDS. See *Injunction Bonds* 2, 3.

ADMINISTRATOR.

1. An administrator who presents a personal demand against his decedent's estate must show that such demand is just and valid, and not barred by the statute of limitations. The statute of limitations does not begin to run until the right of action accrues. *Cinn v. Cann* 138.
2. Where a son, who is also the administrator of his father's estate, sues such estate for wages claimed for services rendered before his father's death, he can not recover unless he proves an express contract, or the facts and circumstances sustained by a preponderance of testimony clearly establish an expectation or intention on the part of his father to compensate him for such services. *Id.*
3. An executor or administrator can not sue or be sued out of the state conferring his authority. *Crumlish's Adm'r v. Railroad Co.* 627
4. After a foreign administrator has come into a cause by petition to assert a demand of his decedent, the domestic administrator comes by petition to assert the same demand in his name. It is proper to recognize the latter as the proper party to represent the

ADMINISTRATOR—Continued.

estate, and he takes the place of the foreign administrator. In such cases, orders or decrees rendered before the domestic administrator became a party do not bind him. *Id.*

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AFFIDAVIT. See *Tax Sale 2.*

AFFIDAVIT OF JURORS. See *Jurors 1, 2.*

AGENT.

1. An agent with unrestricted management of a mercantile, farming and general trading business, carried on in his name, with the right to buy, sell and exchange, has a lien on all the property accumulated in such business, and in his possession, for all advancements made, expenses and liabilities incurred, proper, necessary, or incident to such business, which is superior in right to any lien which may be created on such property by the reputed owner thereof; and while he may not, without the consent of those interested, transfer or assign such lien to another, yet he has the right to sell a sufficient amount of such property to satisfy such liabilities, or may transfer the possession thereof to a trustee, to be held by him until such liabilities are fully discharged, and the lien thereby extinguished. *Dewing v. Hutton 521.*
2. The possession of the trustee under such circumstances is the possession of the agent, and the lien is not released or waived. *Id.*
3. Such trustee, with the consent of the interested parties, may sell the property and extinguish the lien. *Id.*

ALIENATION INTER VIVOS. See *Construction of Trusts 20.*

AMENDED BILL.

An amended bill must not introduce another and different cause of suit from that of the original bill. But an amended bill is no departure from the original if it tend to promote a fair hearing of the matter of controversy on which the suit was originally really based, provided it do not introduce a new substantive cause of suit different from that stated, and different from that intended to be stated in the original bill. An amended bill can not be allowed containing statements inconsistent with the nature of the original bill or changing the cause of suit. By it allegations may be changed or modified, and others added, provided the identity of the cause of suit be preserved. *Bird v. Stout 43.*

AMENDED DECLARATION. See *Insurance Policy 5, 6.*

AMOUNT OF POLICY. See *Insurance 5.*

AMOUNT OF RECOVERY. See *Insurance Policy* 7.

ANSWER. See *Evidence* 8.

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APPEAL. See *School Lands*.

ARGUMENT OF COUNSEL.

1. Counsel necessarily must be allowed considerable latitude in the argument of a case, and, unless the court in a felony trial permits counsel for the state to so far transgress the rule of propriety as clearly to prejudice the prisoner, the judgment will not be reversed because of improper remarks by counsel made to the jury in argument. *State v. Shawn* 1.
2. Where a criminal trial is in other respects fair, a verdict of conviction will not be set aside by this Court for improper remarks of counsel, where it is plainly warranted by the evidence in the case under the law, and no other verdict could have been found without misconduct by the jury. *Id.*

ASSENT OF INSURER. See *Insurance Policy* 2, 3.

ASSIGNEE OF FRAUDULENT MORTGAGE. See *Assumpsit* 2.

ASSIGNMENT. See *Bond* 1, 2; *Judgment by Confession*.

ASSIGNMENT BEFORE LOSS. See *Insurance Policy* 2, 3.

ASSIGNMENT OF BOND.

- 1 The plaintiff took from the defendant a written assignment without recourse of a bond on M., and sued to recover his money back on the ground of fraudulent representation. To avoid such contract, the representation must be of a material fact, and be false within the knowledge of defendant, and be made with intent on his part that plaintiff should act upon it, which representation the plaintiff, in ignorance of its falsity, relies upon, and is thereby misled to his injury and damage. *Houston v. McNeer* 365.
2. Such written assignment without recourse can not be changed in its terms by parol evidence. *Id.*
3. By such contract the assignee takes upon himself all risks of collecting the money, provided the instrument assigned was in fact what it seemed to be—a genuine, valid, subsisting debt. *Id.*

ASSIGNMENT OF CHOSE IN ACTION.

1. A simple assignment of a chose vests in the assignee only equitable title, the legal title remaining in the assignor, and under section 14, chapter 99, Code, the assignee may sue in his own name, or he may sue in the name of the assignor for his, the assignee's, use. Though advisable to declare in the declaration and summons that the assignor sues for the use of the assignee, omission to do so is immaterial, as the declaration of such use is no part of the pleading. *Bentley v. Insurance Co.* 729.
2. No formal words are necessary to make an assignment of a chose in action. Anything showing an intent to assign on the one side, and an intent to receive on the other, will operate as an assignment. It need not be in writing. *Id.* 730.
3. An assignment of a chose as collateral security for a debt will enable the assignee to recover from the debtor the whole liability under it, though, as between assignor and assignee, part of it may belong, after the recovery, to the assignor. *Id.*
Also *Insurance Policy* 1.

ASSIGNMENT TO MORTGAGEE. See *Insurance Policy* 4.

ASSUMPSIT.

1. General *indebitatus assumpsit* does not lie for the breach of an express contract of warranty. *Houston v. McNeer* 365.
2. A party buys and takes a conveyance of certain real estate from a second party, who is insolvent. The real estate is subject to three mortgages and a judgment lien. The first party, for the purpose of making a proper application of the purchase money and in order to control and thereby clear off the charges and liens, having made known to a third party, one of the mortgagees, his object, takes from him a separate written assignment of one of the mortgages and the negotiable note payable to his order, not yet due, thereby secured, which was not endorsed; and the first party was ignorant of the facts, but was induced by the false and fraudulent representations of the third party, the mortgagee, who knew that the mortgage was fraudulent and voidable, to believe, and did believe, that the mortgage of two thousand dollars was a valid and subsisting charge to the extent of one thousand, two hundred and three dollars and eighty two cents, which sum he paid the mortgagee for the assignment, when in fact, and to the knowledge of the third party, the mortgage was wholly without consideration, and had been given and taken with the intent to hinder, delay and defraud the creditors of the mortgagor, and was so held in a suit to foreclose, of which the assignor had notice; and was therefore wholly worthless to the assignee. *Held*, such assignee is entitled to recover back the sum with its interest, paid for the assignment. Such recovery may be had on a special count in general *indebitatus assumpsit*, setting forth specially the facts creating the liability, and averred as the consideration of the promise. *Robinson v. Welty* 385.

3. It may also be recovered back on the common count in general *indebitatus assumpsit* for money had and received, accompanied with a sufficient bill of particulars. *Id.*
4. In such case it is not a good defense for the assignor to aver and prove that if the assignee, the plaintiff in the suit to foreclose, had set up, by way of confession and avoidance, the fact that he was a *bona fide* assignee for value, without notice of the fraud rendering void the mortgage as against the creditors of the mortgagor, it would have been held good in his hands and allowed. See *Holmes v. Gardner* 33 N. E. Rep. 644 (50 Ohio St. 167). *Id.*
5. General *indebitatus assumpsit* does not lie for the breach of an express contract of warranty. *Id.* 386.
Also *Insurance Policy* 8.

ASSUMPTION OF FACTS. See *Instructions* 9.

AUTHENTICATION OF OFFICIAL SIGNATURES. See *Mechanic's Lien* 2.

AUTHENTICATION OF PAPERS. See *Evidence* 22.

AUTHORITY OF AGENT. See *Insurance* 4.

BILL IN CHANCERY.

Where a bill in chancery presents no substantial grounds for equitable interference, it is properly dismissed, as no errors committed by the court can be considered prejudicial to the plaintiff. *Rollins v. Casket Co.* 590.
Also *Chancery Pleading* 2.

BILL IN EQUITY. See *Amended Bill*.

BILL OF REVIEW.

1. A person is not entitled to file a bill of review who is not a party to the original suit, and whose rights are in no manner affected by the decree sought to be reviewed. *Chance/lor v. Spencer* 337.
2. A joint owner of property, who, being a party to a suit, allows his undivided interest in such property to be sold to satisfy judgment liens thereon, can not file a bill of review to set aside the decrees in such suit, for the sole purpose of having the property, not being susceptible of partition, sold as a whole, for by his negligence he has waived whatever rights he may have had in this respect. *Id.*
3. A bill of review must state substantially the former bill or bills, the decrees and proceedings thereon, including the decree complained of, and the point wherein the party filing it is aggrieved. *Dunn v. Rennick* 350.
4. On a bill of review for error of law, that error must be collected from the pleadings, and exhibits filed with the pleadings and orders and decrees, and must be made out on facts admitted in the pleadings, or stated in the decree as facts found. The depositions

can not be looked to. An error of the court in reaching a **wrong** conclusion as to facts upon the evidence is not correctible by bill of review, but by appeal. *Id.*

5. No one can correct, either by bill of review or appeal, or writ of error, an error not aggrieving him. *Id.* 351.
6. No bill of review for error of law will lie to a decree of the supreme court of appeals.

Can one of two executors sell land under a will? *Id.*

Also *Wills* 7.

BONA FIDE ASSIGNEE. See *Assumpsit* 4.

BOND.

1. The assignment of a bond or note secured by deed of trust carries with it, as an incident of such assignment, the benefit of the lien of the deed of trust, unless excluded expressly or by fair and reasonable implication. *Thomas v. Linn* 122.
2. A credit properly endorsed on such bond of an unconditional payment made by the trust debtor, and so entered at his instance, extinguishes the debt and lien to that extent; but it may be erased by the express agreement of the creditor, the debtor, and the party to whom the bond is then assigned; but the question whether the benefit of the deed of trust also passes thereby, the assignment being silent on the subject, is open to independent proof. *Id.*
3. In the absence of an express agreement to the contrary, the assignment of a bond or non-negotiable note imports a guarantee that the assignee shall receive the full amount of the bond or note assigned, if he fail to collect the same after the exercise of due diligence. *Id.*
4. But if the amount paid for the bond is shown, that, with its interest, is the true measure of the recovery. *Id.*
5. And he can not recover merely on default of the debtor, but only after legal recourse against him has been exhausted, unless it appears that before the bond fell due the debtor became insolvent, or from some cause a suit against him would have been unavailing. *Id.* 123.

Also *Wife's Separate Estate* 2.

BONUS. See *Corporations* 3.

BURDEN OF PROOF. See *Negotiable Note* 1; *Partnership* 2; *Railroad Companies* 5.

BURGLARY. See *Criminal Law* 5, 6.

CAPACITY OF DEFENDANT. See *Criminal Law* 4.

CATTLE GUARDS. See *Railroad Companies* 2.

CERTIFICATION. See *Evidence* 24.

CERTIORARI. See *Nuisance* 7.

CHANCERY. See also different headings under *Equity*.

CHANCERY COMMISSIONER'S REPORT.

When a commissioner to whom a cause is referred to settle large and intricate matters of account, containing many contested items, returns a report showing only an aggregation of items in accordance with his conclusions, and the report is excepted to for this reason, and the Circuit Court overrules such exceptions and confirms the report; on appeal this Court will reverse the decree of confirmation, and remand the cause, that a proper itemized statement of such accounts may be made. *Dewing v. Hutton* 521.

CHANCERY PLEADING.

1. Where a bill or other chancery pleading exhibits a document, the document is a part of such bill or pleading as fully as if incorporated therein. *Kester v. Lyon* 162.
2. A bill framed with a double aspect, but upon consistent states of facts, praying relief in the alternative, is not for that reason open to objection. *Blowpipe Co. v. Spencer* 698.

CHANCERY PRACTICE.

1. Where there is no exception to a commissioner's report, except as to error on its face, it is taken as admitted by the parties to be correct, both as to the principles and the evidence on which it rests, and the court will not look into it, but must act on it as so admitted, except as to infants and persons *non compos*. If excepted to not later than the first term after its return, or later by leave of court, the admission of its correctness ceases, and the court will examine it; but on the hearing of such exception, unless taken within ten days after completion of the report before the commissioner, no evidence before him can be used, unless he has made it a part of the report, or certified it, or the court requires him to certify such evidence by order, in which cases it may be used to sustain the exception; but depositions taken after the return of the report can not be used to overthrow the report. They can be used only to support a motion to recommit the report. *Ward v. Ward* 612.
2. Error on the face of a report may be taken advantage of in the lower or appellate court, with or without exceptions. *Id.*
3. Where exception is taken to a commissioner's report before the commissioner, within ten days after its completion, it is his duty to certify the exceptions and evidence before him relating to the exceptions, with such remarks as he may see proper to make, in order that the exceptions may be heard by the court upon such evidence. He should so certify the evidence as to show it to be the evidence sent up. *Id.*
4. Where such exception has been so taken within ten days, the party excepting, or the adverse party, may take further evidence before the return of the report, and upon it the commissioner may

CHANCERY PRACTICE—*Continued.*

amend his report, or make an amended report, as may suit the case, and then return his report and amendment, if any, to the office of the court. *Id.*

5. A person who comes for the first time into a pending cause by petition, and is a proper person to file such petition, may have prior erroneous orders in the cause reheard and corrected, upon prayer for that purpose in his petition, whether the case be proper for a petition for rehearing or bill of review in the case of a party to a cause. *Crumlish's Adm'r v. Railroad Co.* 627.
Also *Commissioner's Report* 4.

CHARGE ON LAND.

1. A reservation or charge upon land, in a conveyance, for maintenance for life, is valid, though no amount be fixed. *Bates v. Swiger* 420.
2. A father deeds to his son a tract of land, in consideration of the payment of a certain sum therein named by said son to his two sisters, one year after the father's death, without interest. Such son is not bound to wait until the end of the year after his father's death before he can pay said amount, but has the privilege of paying it at any time during the year. *Thompson v. Lyon* 87.
3. An offer to pay one of the sisters the amount coming to her under the deed, two or three days before the end of the year, and counting the money down to her, which she declined to receive, without assigning any cause, constituted a valid tender, under the circumstances. *Id.*
4. Said sister having made no subsequent demand for the money, said son, upon paying the money due said sister into court after giving proper notice, was entitled to a release of the vendor's lien reserved in said deed, so far as it secured her said sum. *Id.*
Also *Constructions of Wills* 1; *Estoppel in Pais* 5.

CIRCUMSTANTIAL EVIDENCE.

In showing the fraud necessary to impeach a conveyance, the fraudulent intent of the parties may be shown by the circumstances attending the transaction. Circumstantial evidence is not only sufficient, but is often the only evidence that can be adduced. *Richardson v. Ralphsnyder* 15.

CLERICAL ERROR. See *Equity Practice* 2, 3, 6.

COLLATERAL SECURITY. See *Assignment of Chose in Action* 3.

COLLECTOR. See *Tax Sale* 1.

COMMISSIONER'S REPORT.

1. Exceptions to a report of a commissioner in chancery must point out the particular errors with reasonable certainty, so as to direct the mind of the court to them. Where exceptions are ta-

COMMISSIONER'S REPORT—*Continued.*

- ken to certain parts of a report, the others not excepted to are admitted to be correct, both as regards the legal principles and the evidence on which they are based. *Kester v. Lyon* 161.
2. If a report is not excepted to it is taken to be correct as to adult parties and will not be examined by either the lower or appellate court, and no advantage of any error therein can be taken, unless it be error apparent on the face of the report; but such an error can be taken advantage of in either court at the hearing, without exceptions. *Id.*
 3. To show such error on the face of a report, in the absence of such exceptions as bring before the court the evidence before the commissioner, recourse may be had to the pleadings and exhibits therewith, provided it be impossible that the alleged error could have been affected by extrinsic evidence. *Id.*
 4. If such report be excepted to within the ten days after completion during which it lies in the commissioner's office for examination, the commissioner must return the exceptions, with such remarks thereon as he thinks proper, and the evidence relating to the exceptions, and such evidence will be considered on the hearing of such exceptions; but, if no exceptions be filed within those ten days, the evidence on which the Commissioner acted is not required to be returned by him, and forms no part of the report, and will not be considered on the hearing of any exceptions that may be afterwards taken to the report, unless made a part of the report by the report itself, or unless it be brought up by order of the court. (But see Acts, 1895, c. 8). *Id.*
Also *Chancery Practice* 1, 2, 3, 4 *Equity Practice* 4, 5.

COMMISSIONS.

1. Commissions to an executor on uncollectible debts ought not to be allowed. If entitled to anything for service as to them, it must be specific compensation. *Kester v. Lyon* 161.
2. The practice of allowing to trustees, complainants and receivers, and their counsel, large and extravagant counsel fees and commissions, payable out of trust funds under the control of the court, commented on and disapproved. *Crumlish's Adm'r v. Railroad Co.* 629.
Also *Receiver* 1.

COMMON COUNTS. See *Insurance Policy* 8.

COMPENSATION. See *Receiver* 1.

COMPETENT WITNESS. See *Evidence* 6, 7, 8, 9.

CONCLUSIVE PRESUMPTION. See *Witness* 3.

CONFLICTING EVIDENCE.

Where the decree complained of is based upon depositions which are conflicting and contradictory in their character, so that it is

CONFLICTING EVIDENCE—*Continued.*

difficult to determine on which side they preponderate, and hard to draw a proper conclusion therefrom, and different judges might reasonably disagree upon the facts proved, the appellate court will refuse to reverse the decree of the court below, although the testimony may be such that the appellate court might have rendered a different decree if it had acted upon the case in the first instance. *Richardson v. Ralphsnyder* 15.

Also *Evidence* 19.

CONSENT DECREE. See *Equity Practice* 2, 6.

CONSTITUTIONAL LAW.

1. That part of section 2, article IX, of the Constitution of the State, which provides that surveyors of roads shall be appointed by the county court, is mandatory, and provides the only mode for filling that office. *Ice v. County Court* 118.
2. That part of paragraph 3 of section 56a of chapter 43 of the Code of 1891 which enacts that the surveyor of roads for each road precinct shall be elected by the people is unconstitutional and void. *Id.*

Also *Incorporation of Municipalities. Liquor Licenses* 2.

CONSTRUCTION OF STATUTES. See *Mechanic's Lien* 6.

CONSTRUCTION OF TRUSTS.

1. The estate taken by the trustees is commensurate with the powers conferred and duties imposed for the purpose intended to be accomplished. In this case the property was given to the trustees in fee simple absolute and in absolute ownership, and such an estate was required. *Carney v. Kain* 758.
2. Where the trustees are invested with the legal title not as a dry, passive trust, but with active continuing duties to perform, it is called an active continuing trust. Such was the trust in this case. *Id.*
3. In such case the court, when called upon by the *cestuis que trustent* to close the trust and cause the property to be conveyed or turned over to them, ought to refuse to grant such request where it was the intention of the creator of the trust that the control and management of the property should be in the hands of the trustees, and subject to their discretion, or where the ultimate purposes of the trust have not yet been accomplished. For both reasons such relief was properly refused in this case. *Id.*
4. Where there is a power of appointment of a certain fund in the trustees to and among certain specified beneficiaries, subject to the unlimited and uncontrolled judgment and discretion of the trustees, such discretion is not to be interfered with in the absence of bad faith. In this case there was such power of appointment; and bad faith is not charged nor shown, but a faithful discharge of duty is alleged and affirmatively appears. *Id.*

CONSTRUCTION OF TRUSTS—*Continued.*

5. The estate which passes under such power of appointment comes not from the trustees, but through them from the donor, and does not, of itself, directly create any contingency in contemplation of law, though it may naturally render the vesting of the executory interest created by executory devise more doubtful. In this case such power of appointment has no bearing in determining the quality of the executory interest created and declared. *Id.*
6. When money is directed or agreed to be turned into land, or land agreed or directed to be turned into money, equity will treat that which is agreed to be or ought to be done as done already, and impress upon the property, as to its being real or personal, that species of character for the purpose of devolution and of title into which it is bound ultimately to be converted. In this case the property was a residuary fund, comprising both real and personal property, and, although the trustees had full power to sell and convert the land into money, they were not expressly directed to do so, and such conversion was not necessary to accomplish the purposes of the trust. *Id.* 759.
7. By the fourteenth clause of this will the testator created and declared in favor of the unborn beneficiaries designated, and to take effect in the event prescribed, certain contingent executory interests in such residuary fund in trust, by executory devise and bequest in fee simple and in absolute ownership. *Id.*
8. To such interests created by executory devise the common-law rule against putting the freehold in abeyance, and the common-law rule against creating freehold estates to commence in future, can not apply, (1) because it is conveyed in trust, (2) because it is created by executory devise, and (3) because the common-law rules are changed by statute. But they are subject to the rule against remoteness. That they do not contravene such rule is *res adjudicata*. (See *Whelan v. Reilly* (1869) 3 W. Va. 597—a suit about the same will, between the same parties, or their privies in right or in representation.) *Id.*
9. Such equitable executory interest remains, with the legal estate vested in the trustees until the time for it to vest in right or in enjoyment comes, when it springs up as an original whole of its own inherent strength, and vests in the one who may then be ascertained to have a right fixed in interest or in possession. *Id.*
10. The will is to be construed as of the time when, ceasing to be ambulatory, it has become fixed by the death of the testator, and not in the light of subsequent events. *Id.*
11. The estate of such unborn devisee is contingent, and can not, in the nature of things, become a vested, equitable estate until he comes into being. *Id.* 760.
12. For some purposes in contemplation of law the equitable estate is treated and considered as though the unborn devisee would probably come into existence. *Id.*
13. It can not be said that such interest comprised in such bequest or devise has failed until it has become incapable of taking effect by

CONSTRUCTION OF TRUSTS—*Continued.*

the termination of the time or event prescribed. The possibility of issue is, in contemplation of law, only extinguished with life. *Id.*

14. Therefore there can be no partial intestacy, for the will is valid, and the testator disposed absolutely, but contingently, of the whole residuary fund. *Id.*
15. And the law presumes that the testator did not mean to die intestate as to any part of his property, unless such intent clearly appear. *Id.*
16. For the contingency that the unborn devisee will not come into existence the testator did not provide, but left such contingency to be met and provided for by law. *Id.*
17. If such contingency shall happen, then such equitable executory interest will spring up in its integrity and vest in possession, in present right of enjoyment in those who are then the heirs at law and personal representatives of the testator, who will take by descent and representation, and not by purchase. *Id.*
18. At the death of the testator, his then heirs at law, etc., had the possibility of a resulting trust, contingent and dependent upon the unborn devisee not coming into being; somewhat in analogy to the possibility of reverter at law. *Id.*
19. Such possibility of resulting trust was coupled with an interest. It was not vested, but the ones who would have taken if such contingency of the executory interest being incapable of taking effect should happen compose the class, and such class which would then take was ascertained, though it was liable to open. *Id.*
20. Such possibility of a resulting trust to such heirs at law, etc., was transmissible under the statutes of descent and distribution, and therefore by devise and bequest under the statute of wills; also by alienation *inter vivos*. *Id.* 781.

CONSTRUCTION OF WILLS.

1. A will gives several pecuniary legacies, and then gives a sum of money to three children, and then gives "the residue of my estate, real and personal," to a brother and three sisters, and appoints that brother its executor. Such will creates a charge on the land for the legacy to those children. *Bird v. Stout* 43.
2. Where it is manifest that it was the design of a testator that legacies should be paid at all events, the implication is that the residuary devisee or legatee shall have only the remainder after satisfaction of the previous dispositions. *Id.*
3. A will charges with a legacy land devised to a person, and he conveys it to a third person, who retains in his hands of the purchase money a sum to pay the legacy, and promises his grantor to pay it. Such grantor may maintain a bill in equity against his grantee, making the legatees parties, to compel the payment of such fund on the legacy, and to enforce the charge on the land. *Id.*

Also *Construction of Trusts* 2-20.

CONTINGENCY. See *Construction of Trusts* 16.

CONTINGENT ESTATES. See *Construction of Trusts* 11.

CONTINGENT EXECUTORY INTEREST. See *Construction of Trusts* 7.

CONTINGENT FEES.

The payment of large contingent fees can not be provided for by the court, no matter how great and peculiar their merit may be. That, as far as lawful, must be left as a matter of express contract between client and attorney. *Crumlish's Adm'r v. Railroad Co.* 629.

CONTINUANCES.

Code, chapter 50, section 58, providing for continuances in actions before a justice, does not apply to proceedings before the mayor under chapter 47, section 39, making it the special duty of the mayor to preserve the peace and good order of the town. *Town of Davis v. Davis* 465.

CONTINUING TRUSTS. See *Construction of Trusts* 2, 3.

CONTINUOUS USE. See *Easement* 4.

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CONTRIBUTION. See *Co-Sureties* 1.

CONTRIBUTION BY COPARCENER. See *Tenancy in Common* 5

CONTRIBUTORY NEGLIGENCE.

1. An engineer runs his train on a sixteen degree curve, at a high rate of speed for such a curve, and against the express orders to him of the railroad company, requiring him at that place to go slow. The engine, with four cars, leaves the track, whereby the engineer is killed. There is some evidence tending to show that the outer rail of the curve is not higher than the inner one. Outside of mere conjecture, this is all that is known of the cause of the accident. There can be no recovery against the company for negligently causing his death; for it thus appears that, if the lowness of the outer rail was a cause of the accident, his own want of due care, and his violation of orders contributed to cause the same. *Robinson v. Railroad Co* 583.
2. Contributory negligence is a bar to the right of recovery. *Id.*
3. In determining whether a boy sixteen years of age was guilty of contributory negligence, the jury have the right to take into consideration his age, capacity, and experience, and although he may have been guilty of an act which in an adult would have amounted to an assumption of the risk of injury, and a waiver of

CONSTRUCTION OF TRUSTS—*Continued.*

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CONTRIBUTORY NEGLIGENCE—*Continued.*

the duty the master owes him, yet he can not be held to have assumed any such risk or waived any such duty, which one of his age, discretion and experience could not fully comprehend and appreciate. *Turner v. Railway Co.* 676.

4. A minor has the right to rely upon the superior skill and knowledge of the foreman having authority over him, and if, in obedience to such foreman's directions, he runs into unknown dangers, against which it is the duty of the foreman to warn him, but which duty such foreman negligently fails to perform, he can not be held to be guilty of contributory negligence or to have assumed the risk of such dangers. *Id.*

Also *Master and Servant* 4. *Railroad Companies* 5.

COPY OF DEED. See *Evidence* 11.

CORPORATIONS.

1. Process emanating from the Circuit Court against a corporation may be served upon any person appointed pursuant to law to accept service for it; but such service must be in the county in which such person resides, and the return must show this, and state on whom and when the service was, otherwise the service shall not be valid. *Frazier v. Railway Co.* 224.
2. A party who takes part in the meeting of stockholders for the organization of a corporation under chapter fifty four of the Code, and votes therein as a stockholder for directors, and, when called upon by order of the directors, pays an assessment on his stock, can not deny the existence of the corporation when sued for his stock, and is liable therefor. *Exposition Co. v. Squires* 307.
3. A corporation has but one asset; namely, a decree for a certain sum against a railroad company, and a decree for the sale of its railroad, etc., to satisfy the same, after first satisfying prior liens and charges to a large amount. The creditors and owners of a greater part of the stock may, if they see fit, give to outside parties, out of the amount decreed to them, a bonus for a guaranty that at the commissioner's sale the railroad, etc., shall be made to bring at least enough to pay their claim, as well as the prior liens and charges. And, if such bonus is made to appear to have been that without which neither creditors nor stockholders would have received anything, then the court will charge the fund thus brought into the cause with the payment of such bonus, and, after the payment of the creditors, distribute the surplus, if any, among the stockholders according to their respective interests. *Crumlish's Adm'r v. Railroad Co.* 628.

See also under *Joint Stock Companies*, *Municipal Corporations* and *Railroad Companies*.

CORRECTION IN EQUITY. See *Insurance* 8.

CO-SURETIES.

1. Between co-sureties there should be proportionate equality of burden. One who has been compelled to pay the whole, the principal being insolvent, has a right in equity to compel his co-surety to pay his equitably equal part. *Hawker v. Moore* 49.
2. To this end he has a right to be subrogated to all the rights and remedies of the creditor, but not to the injury of any one who, by any rule of strict law, or in equity and good conscience, stands on higher ground, or for any reason has a better right. Such a one will not be displaced or his right disturbed. This is the essence of the doctrine of subrogation. *Id.*
Also *Fraudulent Conveyances*.

CO-TENANTS.

Cotenants, who commit waste, are liable to each other jointly or severally for the damages; but the amount of a recovery against a stranger or a grantee of a cotenant must be apportioned to correspond with his undivided interest in the land. A case where these principles are applied. *McDodrill v. Lumber Co.* 565.

COUNSEL FEES. See *Receivers* 4, 5; *Commissions* 2; *Contingent Fees*.

COVENANT TO KEEP IN REPAIR. See *Lease* 4.

CREDITORS. See *Fraudulent Assignment* 4.

CREDITORS' PETITION.

1. Creditors may come in by petition to a suit attacking a deed on the ground of fraud, and their priority will be determined by the date of filing their petition, unless they have other ground of priority. *Richardson v. Ralphsnyder* 15.
2. A creditor may file his petition in a cause pending which has for its object the vacation of a fraudulent conveyance, and, upon proper allegations, be made a party to the suit, and the bill, exhibits, answers, depositions, orders and decrees, and all the proceedings in said cause, may, upon proper prayer, be read as part of his petition. *Id.* 16.

CRIMINAL LAW.

1. The waiver of a preliminary examination by a person charged with crime is *prima facie* evidence of probable cause. *Brady v. Stiltner* 289.
2. "The discharge by a justice of the plaintiff who has been arrested and brought before him for examination or the refusal of the grand jury to indict him is *prima facie* evidence of want of probable cause but it is liable to be rebutted by proof." When the refusal of the grand jury to indict is opposed to the refusal of the justice to discharge, one rebuts the other, so as to render neither *prima facie* evidence of the existence or want of probable

CRIMINAL LAW—*Continued.*

- cause; and, if the plaintiff manages in any way to have the evidence for his defense considered by the grand jury, their finding is tantamount to an acquittal by a petit jury, and is not *prima facie* evidence of the want of probable cause on the part of the prosecutor. *Id.*
3. The twelfth point of the syllabus in the case of *State v. Robinson*, 20 W. Va. 714, is approved. *State v. Williams* 268.
 4. Capacity to commit crime is a question to be determined by the jury from the age, appearance and conduct of the accused, both at the time of the commission of the offense and at the time of the trial. *Id.*
 5. The criminal law of this state includes all buildings, as either a dwelling house, or outhouse adjoining thereto or occupied therewith, or as an office, shop, warehouse, banking house, or building other than a dwelling house. The use of the building at the time of the offense determines its character. *Id.*
 6. The third and fourth points of the syllabus in the case of the *State v. McClung*, 35 W. Va. 280, are approved. *Id.*
Also *Argument of Counsel* 1.

CURATIVE ACT. See *Tar Sales* 3.

DAMAGES.

1. Where the case is one of indeterminate damages, and the law gives no specific rule of compensation, the decision of the jury upon the amount of damages is generally conclusive, unless the amount is so large or small as to induce the belief that the jury was influenced by passion, partiality, corruption, or prejudice, or misled by some mistaken view of the case; but, if so excessive as to induce such belief, it will be set aside. *Trice v. Railway Co.* 272
2. The common-law definition of the term "exemplary damages" is damages inflicted by way of punishment upon a wrongdoer as a warning to him and others to prevent a repetition or commission of similar wrongs. *Mayer v. Frobe* 246.
3. The term "exemplary damages," in section twenty of chapter twenty nine, Acts of 1887, is used according to its common-law definition, and can not be otherwise construed without extrajudicial interference with a plain legislative enactment. *Id.* 247.
4. The first and second point of the syllabus of *Pegram v. Stortz*, 31 W. Va. 220 (6 S. E. Rep. 485), and the first point of the syllabus of *Beck v. Thompson*, 31 W. Va. 459 (7 S. E. Rep. 447) in so far as they hold that exemplary damages, in a proper case, can not be inflicted by way of punishment in a civil suit upon a wrongdoer, are hereby disapproved and overruled. *Id.*
5. In actions of tort, where gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil

DAMAGES—*Continued.*

obligations affecting the rights of others appear, or where legislative enactment authorizes it, the jury may assess exemplary, punitive or vindictive damages; these terms being synonymous. *Id.*

6. The action of the jury in assessing damages in case of the death of a person by the wrongful act, neglect, or default of another is not reviewable, as no damages allowed by the jury within the limit fixed by the statute can be deemed excessive, their determination of this question being absolute and exclusive as to what damages are fair and just, unless the verdict evinces passion, prejudice, partiality, or corruption on the part of the jury. *Turner v. Railway Co.* 676.

Also *Injunction Bond* 1; *Municipal Corporations* 1, 2, 3; *Railway Ticket* 1, 2.

DECLARATION. See *Injunction Bond* 1; *Pleading* 1, 3, 4; *Railroad Companies* 6.

DEED.

1. A paper purporting to be a deed of gift of real estate, which has a scroll annexed to the grantor's signature, with the word "seal" written in it, but which fails to recognize said scroll as a seal in the body of the instrument, but which paper has been duly acknowledged for record by the grantor, held to be a deed. *Cosner v. McCrum* 339.
2. A deed from a husband to his wife for real estate, while inoperative and void at law, is nevertheless valid in equity, and will confer upon the wife a good equitable estate, which in all cases will be enforced against the husband by a court of equity. *Id.* 340.

Also *Evidence* 15, 16; *Instructions* 1.

DEED OF TRUST. See *Bond* 1, 2.

DEMURRER. See *Pleading* 2.

DEPOSITIONS.

A deposition of a party read on the hearing in the Circuit Court can not be ignored or suppressed from the hearing of an appeal in this Court on the ground that since the decision in the Circuit Court the adverse party has died. *Hinkson v. Ervin* 112. Also *Bill of Review* 4.

DESCRIPTION OF PREMISES. See *Pleading* 1.

DILIGENCE AND CARE. See *Master and Servant* 5.

DISCRETION OF TRUSTEES. See *Construction of Trusts* 4.

DISTRIBUTION OF ASSETS. See *Joint Stock Companies* 2.

DUE BILL. See *Undelivered Writing* 1.

DWELLING HOUSE. See *Criminal Law* 5.

EASEMENT.

1. A private right of way is the right of going over another man's land, and may be acquired by grant, express or implied, or by prescription. *Boyd v. Woolwine* 282.
2. When a man grants land to another in the middle of land retained, he impliedly gives the grantee a way to come at it, across the land retained. This is an instance of what is called a "way of necessity." *Id.*
3. A private right of way by prescription may be acquired by a visible, continuous, uninterrupted use for twenty years under a *bona fide* claim of right. *Id.* 283.
4. The continuous and uninterrupted use of a passaway for twenty years or more by the people generally, though with the knowledge and consent of the owner of the land, will not constitute it a county highway; it must be accepted or in some way recognized as such by the county court. *Id.*
5. A mandatory injunction will lie to cause an obstructed or closed private way to be cleared and opened for the use of the owner.
A case in which these principles are applied. *Id.*

EJECTION OF PASSENGER. See *Railway Ticket* 1, 2.

EJECTMENT. See *Evidence* 12.

EMPLOYMENT. See *Master and Servant* 2.

ENFORCEMENT OF CHARGE ON LAND. See *Construction of Wills* 3.

EQUITABLE ESTATE. See *Construction of Trusts* 12, 13.

EQUITABLE ESTOPPEL. See *Estoppel in Pais* 2, 3.

EQUITABLE EXECUTORY INTEREST. See *Construction of Trusts* 17.

EQUITY. See also under different heads under *Chancery*.

EQUITY JURISDICTION. See *Estoppel in Pais* 2.

EQUITY PRACTICE.

1. Where the original papers in a cause have been lost, they may be supplied as provided in section 14 of chapter 130 of the Code; and in a chancery cause, where the lost bill is thus supplied, and

EQUITY PRACTICE—*Continued.*

the defendant appears and files his answer thereto, he thereby waives any objection to the manner in which the bill was supplied, or to the authenticity of the copy thus supplied. *Stewart v. Stewart* 65.

2. After the term at which a consent decree is entered it can not be set aside, modified, or altered without the consent of the parties, except only to correct a clerical error, which is a mistake made by the clerk in entering such consent decree, and it may be corrected by the original draft of the decree furnished the clerk by the court; or it may be a miscalculation or mistake in some arithmetical operation, whereby an erroneous sum is entered in such consent decree, where all the parties are agreed on the basis of the calculation, and the mistake is simply an arithmetical mistake, or a simple blunder, in performing an arithmetical operation, all parties being agreed on the operation to be performed. *Id.*
3. In order that a decree may be corrected or reversed on motion under section 1 of chapter 134 of the Code, the error complained of must be a clerical error, or error in fact for which a judgment or decree may be reversed or corrected on motion or writ of error *coram nobis*. *Id.*
4. When questions purely of fact are referred to a commissioner, to be reported upon, the findings of the commissioner, while not as conclusive as the verdict of a jury, will be given great weight, and should be sustained unless it plainly appears that they are not warranted by the evidence. This rule operates with peculiar force in an appellate court where the findings of the commissioner have been approved and sustained by the decree of the inferior court. *Id.*
5. Generally, exceptions to the report of master commissioners partake of the nature of special demurrers, and, if the report is erroneous, the party complaining of the report or excepting there-to must point out the errors in his exceptions with reasonable certainty, so as to direct the mind of the court to them. When he does so, the parts not excepted to are admitted to be correct, not only as regards the principles, but also as relates to the evidence, on which they are founded. *Id.*
6. A decree or order made by consent can not be set aside either by rehearing or appeal or by bill of review, unless by clerical error anything has been inserted in the order as by consent, to which the party had not consented, in which case a bill of review might lie. *Id.* 66.

Also *Creditors' Petition* 2.

ERROR. See *Bill of Review* 5.

ERROR OF LAW. See *Bill of Review* 4.

ESTATE OF TRUSTEES. See *Construction of Trusts* 1.

ESTATE UNDER POWER OF APPOINTMENT. See *Construction of Trusts* 5.

ESTOPPEL. See *Corporations* 2; *Evidence* 25.

ESTOPPEL IN PAIS.

1. Where a party who claims to be the owner of a tract of land has notice of the fact that a railroad company is excavating a tunnel through a mountain located on said land, under claim of title thereto, remains silent as to his ownership of the land, with full knowledge of his rights, and assists in the construction of said tunnel from its commencement until its completion, and the railroad is constructed through the same, without asserting any claim to the land through which the tunnel passes, and then institutes an action for damages against the railroad company for taking his land, he will be estopped from recovering in said action, and may be enjoined from further prosecuting such action for damages. *Railway Co. v. Perdue* 442.
2. Such equitable estoppel may be asserted in a court of equity. *Id.* 443.
3. When one of two innocent persons—that is, persons each guiltless of an intentional moral wrong—must suffer a loss, it must be borne by that one of them who by his conduct, acts, or omissions has rendered the injury possible. *Id.*
4. A party who by his acts, declarations, or admissions, or by failure to act or speak under circumstances when he should do so, either designedly or with willful disregard of the interests of others, induces or misleads another to conduct or dealings which he would not have entered upon but for this misleading influence, will not be allowed afterwards to come in and assert his right to the detriment of the person so misled. That would be a fraud. *Id.*
5. One owning or having any interest in or charge upon land, knowing that another is about to purchase it, who declares to such other person, that he has no interest in the land, and that the one proposing to sell has the absolute right to the land, can not set up any ownership, interest, or charge, then existing, hostile to the right acquired by such purchaser. *Bates v. Swiger* 420.
6. Where one, by words or conduct, intentionally causes another to believe in the existence of a certain state of things, or such words or conduct are of such nature as he has reason to believe will cause him to so believe, and such other, not knowing to the contrary, acts thereon, the former will be estopped from averring or claiming under a different state of things, then existing and known to him, to the prejudice of the other party. *Id.* 421.

EVIDENCE.

1. In a controversy over a disputed paper, evidence which tends to impeach the truth of the matter contained in such paper is admissible. *Flowers v. Fletcher* 103.

EVIDENCE—*Continued.*

2. To render a person a competent witness to testify as to the handwriting of another, it is not sufficient to show the receipt of friendly letters purporting to come from such person alone, but some admission or acquiescence equivalent to an acknowledgment that she was the writer of such letters must be shown on the part of such person, independent of their receipt and contents. *Id.*
3. A judgment will not be reversed because of the admission of improper testimony plainly not prejudicial to a fair trial of the case. *Id.* 104.
4. When a transfer of property has been made, a declaration by the transferor that he is still the owner of the property, made after such transfer, is not admissible against the transferee. *Crothers v. Crothers* 169.
5. Declarations of a deceased person, claiming ownership of specific property, are not competent evidence in favor of his administrators, or others claiming title under him, whether such declarations of ownership were made before or after the title of the adverse claimant commenced. *Masters v. Varner's Ex'rs*, 5 Gratt. 168. *Id.*
6. A person interested may give evidence against his own interest, both at common-law and under section twenty three of chapter one hundred and thirty of the Code. *Id.*
7. The purpose of section twenty three of chapter one hundred and thirty of the Code, was to enlarge the competency of witnesses. It does not *per se* render any incompetent who are competent at common-law. The exception therein does not create incompetency, but leaves the cases specified in it just as they were at common-law. *Id.*
8. Children of a decedent, who are his distributees, are competent witnesses to prove a transfer by their father of personal estate in favor of the transferee. *Id.*
9. By common-law a person is a competent witness in a case if the proceeding can not be used as evidence for him, though he may be interested in the question in issue, and may entertain wishes on the subject, and may even have occasion to contest the same question in his own case in a future suit. This rule has not been changed by section twenty three of chapter one hundred and thirty of the Code of 1891, as to the competency of a person to testify against the representatives of a deceased person in relation to a transaction had personally by the witness with the deceased person. *Id.*
10. When the evidence tends in a fairly appreciable degree to sustain the plaintiff's action, the court must not strike out his evidence or direct a verdict for the defendant. *Henry v. Railway Co.* 235.
11. An office copy of a deed improperly admitted to record is not competent evidence. *Clarke v. Perdue* 300.
12. Where an action of ejectment is brought by an adverse claim-

EVIDENCE—*Continued.*

ant against a tenant to recover possession of the premises, and judgment is rendered for such plaintiff against the tenant by default, and a writ of possession is executed by which the plaintiff is placed in actual possession, the possession is thereby changed, and the landlord is thereby actually turned out—in a second action of ejectment by plaintiffs, who derive title from the plaintiff in the first suit, against such landlord, sued as defendant, the record of the recovery in the former suit is competent evidence on behalf of the plaintiffs in the latter suit as showing or tending to show that the defendant's possession at that time was ended and changed by the execution of such writ of possession. *Id.*

13. Where the plaintiff's evidence appreciably tends to sustain the action, the court ought not to strike it out. *Yeager v. City of Bluefield* 484.
14. Under section 9, chapter 131, Code, 1891, when exception is taken to the action of the court upon a question involving evidence on a motion for a new trial or otherwise, all the evidence, conflicting or not, may be certified, and this Court must consider all such evidence, whether conflicting or not, not rejecting any from consideration. If, upon such evidence, the verdict plainly appears to be contrary to or without sufficient evidence, plainly against the decided and clear preponderance of evidence, it may be set aside, though the evidence be conflicting. This power should be exercised with great caution. *Id.*
15. Where a deed made under a decree by a commissioner or other authority is offered in evidence as a connecting link in the plaintiff's chain of title to land, it is necessary to introduce with it so much of the record of the suit in which such decree was made as will satisfactorily show that the person having the legal title to the land conveyed, was a party to the suit, and as will identify the land conveyed with the land decreed. *McDodril v. Lumber Co.* 565.
16. As against a party who claims against the deed and is a stranger thereto, the recital of such facts therein, without more, is not evidence thereof, and the deed does not prove the transfer of the title to the land it purports to convey. *I*
17. A verdict based alone on mere conjecture, without evidence to support it, where the rule as to the burden of proof requires some reliable affirmative evidence, should not be permitted to stand. *Robinson v. Railroad Co.* 583.
18. Whether plaintiff shall be allowed to give further evidence after defendant's evidence is closed is within the discretion of the trial court; and its exercise will rarely, if ever, be the ground of reversal by an appellate court. Clearly, he is entitled to give evidence to rebut that of the defendant. *Perdue v. Coal & Coke Co.* 378.
19. If there be, in the opinion of the jury, a substantial conflict in the evidence or circumstances, as to whether the killing was done in self-defense, and the circumstances or other evidence prepon-

EVIDENCE—*Continued.*

- derate in favor of self-defense, or if it was equally balanced as to the killing being done in self-defense, the jury ought not to convict either of murder or manslaughter. *State v. Zeigler* 594.
20. Where a court which tries a cause certifies all the evidence adduced on the trial, and from the evidence so certified it clearly appears that it was wholly insufficient to sustain the verdict, this Court will set aside the verdict, and, in a proper case, award a new trial. *Id*
21. Allegations of facts not necessary to maintain an action or defense are immaterial and surplusage, and need not be proven. *Wilson v. Rowder Co.* 413.
22. Where a judge is *ex officio* clerk of a court, then both certificates specified in section 19, chapter 130, Code, are not required, his certificates as judge being sufficient. *Id.*
23. Under section 4, chapter 13, Code, courts take judicial notice, without proof, of the law of another state, and in so doing may consult any book purporting to contain, state, or explain the same, and consider any testimony, information or argument offered on the subject. *Id.* 414.
24. Original deeds made outside of this state, and so certified as to warrant recordation in this state, are admissible in evidence here. *Id.*
25. An answer in chancery in another suit is admissible as evidence of an admission therein in behalf of one though not a party to the suit in which it was filed, though it would not be admissible as an estoppel under the principle of *res judicata*. *Id.* Also *Circumstantial Evidence*; *Conflicting Evidence*; *Instructions* 1, 2; *Partnership* 1; *Possession* 1.

EXCEPTIONS. See *Chancery Commissioners Report* 4; *Chancery Practice* 1, 2, 3, 4; *Commissioner's Report* 1, 2, 3; *Equity Practice* 5.

EXCLUSION OF EVIDENCE. See *Evidence* 13.

EXECUTORS. See *Administrators* 3. *Commissions* 1.

EXECUTORS' SALES. See *Wills* 6, 7.

EXECUTORY DEVISE AND BEQUEST. See *Construction of Trusts* 7.

EXECUTORY INTEREST. See *Construction of Trusts* 5, 9, 19.

EXEMPLARY DAMAGES.

In all cases of negligence the law governing the assessment of exemplary, punitive, or vindictive damages is the same whether death result or not. *Turner v. Railway Co.* 676.

Also, *Damages* 2, 3, 4, 5.

EXHIBITS. See *Chancery Pleading* 1; *Pleading* 2.

EXPRESS WARRANTY. See *Assumpsit* 1, 5.

EXTRAORDINARY EXPENSES. See *Corporations* 3.

FAILURE OF CONSIDERATION. See *Obligation under Seal* 1.

FALSE REPRESENTATIONS. See *Assignment of Bond* 1.

FELLOW SERVANTS. See *Railroad Companies* 3, 4.

FIRST DAY OF TERM. See *Judgment* 7.

FORBEARANCE TO SUE. See *Valuable Consideration* 1.

FOREIGN ADMINISTRATOR. See *Administrator* 4.

FOREIGN DEED. See *Evidence* 24.

FORFEITURE OF CHARTER. See *Municipal Corporations* 6, 7.

FORGERY.

1. While in an indictment for forgery it is unnecessary to set forth a copy or fac simile of the instrument forged, yet if this is done, and there is a material variance between the copy so set out and the paper offered in evidence, such paper, on motion of the accused, should be excluded from the consideration of the jury. *State v. Fleshman* 726.
2. When the alleged forged note is set out in *haec verba*, and in the body thereof are the words "with 6 per cent. int. from date," and the note offered in evidence contains no such words, this is a variance, both in substance and legal effect, fatal to the introduction of such last mentioned note as evidence in support of the allegations of the indictment. *Id.*

FORMER RECOVERY. See *Evidence* 12.

FOR VALUE RECEIVED. See *Valuable Consideration* 2.

FRAUD. See *Estoppel in Pais* 4; *Subrogation* 3.

FRAUDULENT ASSIGNMENT.

Where an assignment of personal property is made in fraud of creditors, they, or any of them, may, in a court of equity, have the same set aside. The creditor who first files his bill obtains thereby a priority, and is entitled to be first paid from the proceeds of the sale of the property, if there are no valid prior liens. *Richardson v. Ralphsnyder* 15.

Also, *Circumstantial Evidence; Creditors' Petition* 2.

FRAUDULENT ASSIGNMENT—*Continued.*

2. A case in which a conveyance was set aside as made on a secret trust in fraud of the grantors creditors, and the land conveyed subjected to the lien of a judgment in favor by subrogation of a co-surety, who had been compelled to pay the whole, the principal debtor being insolvent. *Hawker v. Moore* 49.

FRAUDULENT INTENT. See *Circumstantial Evidence*.

FRAUDULENT MORTGAGE. See *Assumpsit* 4.

FREEHOLD IN ABEYANCE. See *Construction of Trusts* 8.

FREEHOLD TO COMMENCE IN FUTURE. See *Construction of Trusts* 8.

GENERAL WARRANTY. See *Specific Performance* 2.

GIFT. See *Husband and Wife* 4.

GRAND JURY. See *Criminal Law* 2.

GRIST MILL.

The five dollars' forfeit prescribed by law (section 37, chapter 44, Code) to be paid by the proprietor of a grist-mill to his customer for taking more toll than allowed by the statute may be recovered in a civil proceeding before a justice of the peace. *West v. Rawson* 480.

GUARDIAN AND WARD.

1. Not a guardian by nature, but only a guardian appointed, who has given bond as and when required by law, is entitled to the possession, care, and management of his ward's estate. *McDorrill v. Lumber Co.* 565.
2. An infant who has no such guardian who has given bond may, for damage done to his real estate, sue by next friend. *Id.*

HANDWRITING. See *Evidence* 2.

HIGHWAY. See *Easement* 4.

HOMICIDE.

1. If an assault is made upon a man with an attempt to commit a felony upon him, he may resist so far as it is necessary to resist the assailant, even if he must take the assailant's life. But this has a limitation. If he can resist the assault and free himself without taking life, and kills the assailant without necessity, he is not excusable. If mere heat of blood impels him to take life in such case, he is guilty of manslaughter. *State v. Zeigler* 593.

HOMICIDE—*Continued.*

2. To reduce homicide in self-defense to excusable homicide, it must be shown that the slayer was closely pressed by the other party, and retreated as far as he conveniently or safely could, in good faith, with the honest intent to avoid the violence of the assault. *Id* 594.
3. Where one without fault himself, is attacked by another, in such a manner or under such circumstances as to furnish reasonable grounds for apprehending a design to take away his life or to do him some great bodily harm, and there is reasonable ground for believing the danger imminent that such design will be accomplished, and the person assaulted has reasonable ground to believe, and does believe such danger is imminent, he may act upon such appearances, and, without retreating, kill his assailant, if he has reasonable grounds to believe, and does believe that such killing is necessary in order to avoid the apparent danger; and the killing under such circumstances is excusable, although it may afterwards turn out that the appearances were false, and that there was in fact neither design to do him some serious injury, nor danger that it would be done. But of all this the jury must judge from all the evidence and circumstances of the case. *Id.*

HUSBAND AND WIFE.

1. Married woman's separate property. Points one, two, three, four, five and ten of the syllabus, in the case of *Trapnell v. Conklyn* (37 W. Va. 242) and point two of the syllabus in case of *Stewart v. Stcut*, 38 W. Va. 478, approved. *Board of Education v. Mitchell* 431.
2. A court of equity will not at the instance of the husband's creditors attempt to charge a wife's separate property with alleged improvements put thereon by the skill and labor of the husband, unless the evidence establishes the existence, and at least the approximate amount, of such improvements. *Id.*
3. When a husband purchases property with his wife's money, and takes the deed in his own name, a resulting trust is raised in her favor; unless it is shown that she intended the money as a gift or loan to her husband, the establishment of which fact devolves on the husband, or those claiming under him. *Berry v. Wiedman* 36.
4. Mere lapse of time is not sufficient to establish a gift on her part, in so far as his collateral heirs are concerned, if he has indulged her in the belief of ownership, and allowed her to improve the property with her separate estate. *Id.*
Also *Deed* 2.

HUSBAND'S CREDITORS. See *Husband and Wife* 2.

IMPLIED ASSENT. See *Waiver of Breach of Contract*.

IMPLIED COVENANT. See *Lease* 1.

IMPLIED WARRANTY. See *Lease* 3.

IMPROVEMENTS BY COPARCENER. See *Tenancy in Common* 3, 4, 6, 7.

INCORPORATION OF MUNICIPALITIES.

Chapter 47 of the Code, in relation to the incorporation of cities, towns, and villages, in so far as it confers on the circuit court functions in their nature judicial and administrative, although in furtherance of the power of the legislative department of the state government, is constitutional and valid. *Bilder v. Central City* 222.

INDICTMENT. See *Forgery* 1, 2.

INFANT. See *Contributory Negligence* 3, 4; *Guardian and Ward* 2.

INJUNCTION. See *Easement* 5; *Estoppel in Pais* 1; *Nuisance* 9.

INJUNCTION BOND.

1. Where the condition of an injunction bond in pursuance of the statute provides that the plaintiff in the injunction cause shall faithfully prosecute said injunction, and shall pay the amount of the judgment enjoined, and all such costs as may be awarded against the complainants, and all such damages as shall be incurred in case the injunction be dissolved; in a suit upon said injunction bond to recover damages incurred by reason of the suing out of said injunction, the declaration must aver that the plaintiff in the injunction, by reason of the dissolution thereof, has incurred and become liable to pay the plaintiff in the suit on said bond some amount of damages. *State v. Hall* 455.
2. Where such bond is made payable to the state, suits may be prosecuted from time to time thereon for the benefit of the person injured by the breach of the condition thereof, until damages are recovered in the aggregate equal to the penalty of the bond. *Id.* 456
3. In such suit it is incumbent on the relator to show title to the judgment enjoined before he would be entitled to recover damages on account of its collection being restrained by the injunction. *Id.*

INNOCENT PURCHASER. See *Specific Performance* 1.

INSOLVENT DEBTOR. See *Judgment by Confession*.

INSTRUCTIONS.

1. It is error for a court to instruct a jury as to the effect of a deed which is not in evidence before them. *Perdue v. Coal & Coke Co.* 373.

INSTRUCTION—*Continued.*

2. It is error in a court, in a case of felony, to give to the jury instructions which are not relevant to the evidence, and which may mislead the jury to the prejudice of the defendant. *State v. Zeigler* 594.
3. If it plainly appears that the defendant could not have been injured by the modification of an instruction asked, even though the modification was unnecessary, the failure to give such instruction without such modification is not sufficient cause for the reversal of the judgment. *Turner v. Railway Co.* 676.
4. It is not error for a court to omit to instruct a jury that it may punish murder in the first degree with either death or confinement in the penitentiary, unless asked to do so. *State v. Cobbs* 718.
5. It is error to refuse to do so when asked, though not asked until the jury announced its verdict, but before its discharge. *Id.*
6. The law does not fix any time for instructions. The court may fix it by rule. *Id.*
7. A court, though asked, is not bound to instruct a jury generally as to the law of the case. Instructions as to the specific law points ought to be asked. A court may, without request, if it think the interest of justice and a fair trial call for it, instruct the jury in matter of law, the instruction being sound in law and relevant to the evidence; but it is not bound to do so unless asked; but, if asked to give such proper specific instructions, it must do so. *Id.*
8. The court suggests privately to counsel of prisoner the prudence of instructing the jury of its power to punish murder in the first degree either with death or by confinement in the penitentiary, and counsel says that he prefers to take chances rather than call the jury's attention to that law at that time. This does not estop the prisoner from asking such instruction later, even after the jury has announced a verdict of murder in the first degree, but before it is received or the jury discharged. *Id.*
9. An instruction should not assume a fact as not proven when there is any evidence tending in an appreciable, though slight degree, to establish it. An instruction should not pass on the weight of evidence. *Bentley v. Insurance Co.* 730.
10. A special question should not be submitted to a jury, if immaterial. *Id.* 731.

INSUFFICIENT EVIDENCE. See *Evidence* 20.

INSURANCE.

1. An oral executory contract for fire insurance is valid, the statute of frauds not applying to it. *Croft v. Insurance Co.* 508.
2. If an oral contract for fire insurance has been made, and before the issuance of the policy the property is destroyed by fire, equity has jurisdiction to compel payment of the indemnity. *Id.* 509.

INSURANCE FRAUDS—*Continued.*

3. Though the assured understands the term to be covered by the insurance to be one year, and the agent of the insurance company understands it to be three years, costing in either case the same premium, this does not render the contract incomplete, so as not to warrant recovery for loss by fire occurring within one year. *Id.*
4. Where an agent represents several insurance companies, and is intrusted with blank policies, signed by the officers, with authority to negotiate policies and issue them without referring them to the companies, and it is agreed by the insured that the agent shall place the risk in such company as he selects, and he does place it with a company, as shown by a memorandum made by him, the agreement is binding upon the company. *Id.*
5. Where, by agreement between the insured and the agent, the agent is to fix such amount of indemnity as he sees proper, and he does fix it, as shown by a memorandum made by him, the oral agreement is binding on the company. *Id.*
6. An agent of an insurance company authorized to negotiate risks may give credit in such executory agreement for the premium. *Id.*
7. Unless in such agreement pre-payment is made a condition precedent, the premium need not be paid until the policy agreed upon is ready to be delivered. *Id.*
8. The agent, by mistake, entered in his memorandum the name of the wrong person as the assured. This will be corrected in a suit in equity on such executory oral agreement, and the person who owns the property insured and who negotiated the insurance may recover in his own name. *Id.*

INSURANCE POLICY.

1. If a promissory note or other chose in action calling for money be assigned, and the party liable therefor promise its payment to the assignee, such assignee may sue on it at law in his own name, without statutory authority, as he has legal title thereto; whereas, without such promise, he would take only equitable title, the legal title remaining in assignor. *Bentley v. Insurance Co.* 729.
2. If, therefore, the insured, before loss by fire under a policy of insurance, assign the right to damages in case of loss, and the insurer consents to the assignment, the assignee may, in his own name, as holding legal title, recover such damages after loss; and a reassignment to the insured party after loss, not assented to by the insurer, would not divest the assignee of his legal title, so as to prevent recovery in the name of the first assignee. *Id.*
3. Where a policy of insurance provides that it shall be void if assigned without the insurer's consent, the clause applies to assignment before loss of the claim for damages in case of loss. *Id.*
4. A policy of fire insurance covers several properties, and a mortgage given by its holder covers only some of these properties. An

INSURANCE POLICY—*Continued.*

- assignment to the mortgagee, as such, of all the right, title, and advantage of the policy holder under it, will entitle him to recover all the loss money for all the properties. *Id.* 730.
5. In an action on a policy of insurance for loss by fire claiming a certain sum as damage, or for loss to certain property, an amended declaration may be filed claiming larger damages, or on additional property, under the same policy, by the same fire. *Id.*
 6. When such amendment is made, the time as to the larger claim made by the amendment, whether under the statute of limitations or under a clause of the policy fixing a limitation for action under it, will stop running at the commencement of the suit, and not continue to the filing of the amended declaration. *Id.*
 7. In an action on a policy of fire insurance the plaintiff is not limited in recovery by the amount of loss specified in the proofs of loss, in absence of fraud. *Id.*
 8. In an action of *assumpsit* on an insurance policy for recovery for loss by fire, there may be included in the declaration, with a count under section 61, chapter 125, Code, the common counts or other counts proper in that form of action. *Id.*

INTENTION OF PARTIES. See *Assignment of Chose in Action* 2.

INTENTION OF TESTATOR. See *Construction of Trusts* 3.

INTEREST. See *Tender* 3.

IRRELEVANT INSTRUCTIONS. See *Instructions* 2.

ISSUE. See *Pleading* 6.

JOINT STOCK COMPANIES.

1. One who subscribes and pays for stock in a joint-stock company is a stockholder, though he have no certificate of stock. *Crumlish's Adm'r v. Railroad Co.* 627.
2. Those claiming as stockholders the right to participate in the distribution of the assets in the winding up of the affairs of a private corporation must produce some satisfactory evidence of a present, subsisting interest. *Id.* 628.

JUDGMENT.

Though a decree or judgment relate to the first day of a term, yet if the case was not ready for hearing or trial, and therefore no judgment or decree could have been given on such first day, it does not relate to the first day, but has the date of its actual entry of record.

Quaere: Do all proceedings of a court relate to the first day of a term?

JUDGMENT—Continued.

Quære: Does computation of time limiting a bill of review begin at the first day of the term, or at the date of actual entry of the decree? *Dunn v. Rennick* 350,

Also *Pleading* 4, 8; *Wife's Separate Estate* 4.

JUDGMENT BY CONFESSION.

A judgment confessed by an insolvent debtor, together with the execution issued thereon, is, in effect, an assignment of the debtor's property to the extent of the lien or levy of such execution, is void as a preference under section two of chapter seventy four of the Code, and inures to the benefit of all the insolvent's creditors. *Mack v. Prince* 334.

JUDGMENT BY NON PROS. See *Pleading* 7.

JUDICIAL NOTICE. See *Evidence* 23.

JUDICIAL PROCEEDING. See *Nuisance* 6.

JURISDICTION.

A person who asserts a claim to a specific amount of damages for an alleged injury sustained in his business will not be allowed to split up his claim in order to reduce it to the jurisdiction of a justice, and to bring consecutive suits before a justice for such claim. *Hale v. Town Weston* 318.

Also *Justice of the Peace; Wife's Separate Estate* 1.

JURORS.

1. Affidavits of jurors that they were ignorant of the law that it is with a jury to say whether murder in the first degree shall be punished with death or confinement in the penitentiary can not be read to impeach the verdict. *State v. Cobbs* 719.
2. As a general rule, affidavits of jurors to impeach their verdict can not be read. *Id.*

JURY.

A court may, for good reason, return a jury to its room to further consider and amend or alter its verdict, at any time before a verdict is received by the court and the jury discharged. *State v. Cobbs* 718.

Also *Contributory Negligence* 3; *Damages* 5; *Evidence* 19; *Instructions* 4, 5.

JUSTICE OF THE PEACE.

Where such justice has jurisdiction of the subject-matter in controversy and does not exceed his legitimate powers, a writ of prohibition should not be granted. *West v. Rawson* 480.

Also *Continuances; Grist Mill*.

JUSIFIABLE HOMICIDE. See *Homicide* 2.

LANDS. See *Construction of Lands* 6.

LAPSE OF TIME. See *Husband and Wife* 2.

LARCENY. See *Criminal Law* 6.

LAW OF FOREIGN STATE. See *Evidence* 23.

LEASE.

1. Where a party in a written lease describes the property as "the premises known as the 'Bedford Salt Furnace Property,' together with all the appurtenances thereto belonging, including six salt wells, tools and fixtures of the same," there is no implied covenant on the part of the lessor that there are on said premises six salt wells of any particular productive capacity, or suitable for the purposes for which they are leased. *Clifton v. Montague* 207.
2. The recitals contained in said lease as to the number of salt wells included in the premises, after the lease has been accepted and acted on for more than two years by the lessee, with ample opportunity of knowing, not only the contents of the lease, but the character and quality of the property leased, must be regarded as conclusive of the fact between the parties to said lease. *Id.*
3. The words "including six salt wells," contained in said lease, create no implied warranty that there were six salt wells on said premises of any particular quality or fitness for manufacturing salt. *Id.*
4. Where a written lease of property provides that the lessee shall keep the same in repair except as to unavoidable accidents and natural wear and tear, the law will not imply a contract on the part of the lessor to repair damages caused by unavoidable accidents. *Id.*

LEGACIES. See *Wills* 1.

LEVY. See *School Board*.

LIABILITY. See *Municipal Corporations* 5.

LIABILITY OF ASSIGNOR. See *Bond* 3, 4, 5.

LIEN.

A lien in the ligament or tie which binds certain property to a particular debt for its payment or satisfaction. *Blowpipe Co. v. Spencer* 698.

LIEN FOR EXPENSES. See *Agent* 1.

LIMITATION OF ACTION. See *Insurance Policy* 6.

LIQUOR LICENSE.

1. The act of February 24, 1869, amending the charter of the town of Ceredo, confers upon the council of that town the sole power to grant or not grant a state license for the sale of intoxicating liquors within the limits of said town. *Wilson v. Assessor* 278.
2. Such act is not repugnant to the constitution of the state (see section forty six of article six, and section twenty four of article eight, of the state constitution), and such sole power to grant such license or not is recognized by section eleven of chapter thirty two of the Code as vested in the municipal authorities of such town.
Id.

LIVE STOCK. See *Railroad Companies* 1.

LOST PAPERS. See *Equity Practice* 1.

MAJORITY. See *Nuisance* 4.

MANDAMUS. See *School Board*.

MANSLAUGHTER. See *Homicide* 1.

MANUFACTURING EXPLOSIVES. See *Nuisance* 9.

MARRIED WOMAN.

- A married woman may, in an action at law or in equity, plead want of consideration against a sealed obligation given by her during coverture. *Williamson v. Cline* 195. Also *Husband and Wife* 1, 3; *Wife's Separate Estate* 1, 2, 3.

MASTER AND SERVANT.

1. When a servant enters into the employment of a master, he assumes all the ordinary hazards incident to the employment, whether the employment be dangerous or otherwise. *Stewart v. Railroad Co.* 122.
2. The test of liability is the negligence of the master, not the danger of the employment, though the danger of the employment may determine the ordinary care required in the case. *Id.*
3. The mere fact of injury received raises no presumption of negligence on the part of the master. *Id.*
4. When a servant willfully encounters dangers which are known to him, the master is not responsible for an injury occasioned thereby. *Id.*
5. A servant having knowledge of danger about him must use diligence and care in protecting himself from harm. *Id.*
6. An employer does not impliedly guarantee the absolute safety of his employes. In accepting an employment, the latter is assumed to have notice of all patent risks incidental thereto, or of which he is informed, or of which it is his duty to inform himself, and he is further assumed to undertake to run such risks.
Id.

MATERIAL FACT. See *Witness*.

MATURED LIABILITY. See *Mechanic's Lien* 6.

MAYOR. See *Continuances*.

MECHANIC'S LIEN.

1. Chapter 75 of the Code creates the mechanic's lien in certain cases, on certain conditions; and section 4 of such chapter, among other things, provides that such account, to be effectually filed for record as a lien, must be sworn to by the person claiming the lien, or by some person on his behalf. Such oath is an element essential to the creation of the lien, and, to be effectual, must be in writing, as a part in some way, of the paper writing filed for record. *Lockhead v. Waterworks Co.* 553.
2. If such affidavit be made before any officer of another state or country, such as the District of Columbia, it is not duly authenticated for record until it is subscribed by such officer, and there be annexed thereto the certificate of the clerk or other officer of a court of record of such state or country, under an official seal, verifying the genuineness of the signature of the first mentioned officer, and his authority to administer an oath. Section 31, chapter 130, of the Code. A case in which these rules are discussed and applied. *Id.*
3. What is known as the "mechanic's lien" on real estate and buildings is the creation of statute. It was unknown at common-law, but the right given by statute to enforce it in a court of equity carries with it all the rights incident to that court's principles and rules and its methods of procedure. *Blowpipe Co. v. Spencer* 638.
4. Such lien can be maintained only by a substantial observance of and compliance with the requirements of the statute, but the statute is given a fair and liberal construction as to the creation of the lien and its enforcement. *Id.*
5. In ascertaining whether the account which is required to be filed and recorded to create the lien is a substantial compliance with the statute in respect to designating the name of the owner of the property, the account proper, and the sworn statement annexed thereto, may be read together. *Id.*
6. Section 4 of chapter 75 of the Code, which requires a just and true account of the amount due after allowing all credits, to be sworn to and filed for record, uses the term "due" in the sense of an existing liability, without reference to whether it be then matured and enforceable by suit or not matured and not then enforceable by suit. *Id.*

MERGER. See *Obligation Under Seal* 2.

MERRY-GO-ROUND. See *Nuisance* 2.

MISTAKE AS TO INSURED. See *Insurance* 8.

MISTAKE AS TO TERM. See *Insurance* 3.

MONEY. See *Construction of Trusts* 6.

MONEY HAD AND RECEIVED. See *Assumpsit* 3.

MOTION TO EXCLUDE EVIDENCE. See *Evidence* 10.

MUNICIPAL CORPORATIONS.

1. Under section fifty three of chapter forty three of the Code, any person who sustains a direct injury to his person or property—for instance, having a limb broken or a horse disabled—by reason of a street in a town being out of repair, may recover damages for such injury by an appropriate action, in a court of competent jurisdiction, against said town. *Hale v. Town Weston* 313.
2. One who suffers an injury only in his business from a street being out of repair can not recover damages therefor from a city or town under section fifty three of chapter forty three of the Code. *Id.*
3. The proprietor of a brickyard who is engaged in the manufacture of brick in the vicinity of a city or town, and in the erection of houses in said town or city, who, in common with others, is injured in his business by reason of the municipal authorities thereof failing to keep a street in repair which constitutes the highway from said town passing said brickyard, can not maintain an action for damages against said city or town for losses sustained by him in his business. *Id.*
4. A municipal corporation is not an insurer against accidents upon streets and sidewalks. Nor is every defect therein, though it may cause the injury sued for, actionable. It is sufficient if the streets are in a reasonably safe condition for travel in the ordinary modes, with ordinary care, by day or night; and whether so or not is a practical question to be determined in each case by its particular circumstances. *Yeager v. City Bluefield* 484. -
5. While the liability of municipal corporations is in its nature absolute, that does not refer to the cause of action. That must exist before the liability arises. *Id.*
6. A forfeiture of the charter of a municipal corporation can not be enforced or taken advantage of in any legal proceeding collaterally or incidentally. That forfeiture must be declared in a proper, direct way. The state only can enforce such forfeiture, as it alone has the right to waive or enforce it. *Hornbrook v. Town Elm Grove* 543.
7. The forfeiture of charters of towns for the causes defined in Code, c. 47, s. 44, must be governed by the principles above stated. *Quaere* can such forfeiture be declared by any judicial proceeding? *Id.*
8. A suit to enjoin the collection of municipal taxes, on the ground that they were illegally imposed by reason of want of authority to impose them from forfeiture of the municipal charter, is not

MUNICIPAL CORPORATIONS—*Continued.*

wrongly brought, from the mere fact that the town is sued in its corporate name. So bringing the suit does not admit its continued existence. *Id.*

MURDER IN FIRST DEGREE. See *Instructions* 4.

NEGLIGENCE. See *Contributory Negligence* 1; *Exemplary Damages*; *Master and Servant* 2, 3; *Nuisance* 1; *Railroad Companies* 1, 6.

NEGLIGENCE OF VICE PRINCIPAL. See *Contributory Negligence* 4.

NEGOTIABLE NOTE.

1. Where it is shown in evidence that a certain negotiable promissory note was made and delivered to the payee at his instance, and for his accommodation for a specific purpose, and that such payee without the knowledge and consent of the maker, used such note for a different purpose, the burden is on the holder of such note to show that he received it in the ordinary course of business, before maturity, for value, without notice of its wrongful misuse by the payee, before he can recover from the maker. *Trust Co. v. McClellan* 405.
2. A pre-existing debt is not such valuable consideration as will protect the holder of a negotiable note wrongfully pledged as collateral security by the payee. *Id.*
3. Where a negotiable note, indorsed by several parties, residing at different places, is made payable at a bank in the city of H., and before maturity it is discounted by a bank in the town of C., and by the last named bank it is indorsed to a bank in the city of H. for collection, and one of the indorsers resides in said city of H. when said note matures and is presented for payment, and payment is refused, and the note is duly protested, the bank to which said note was indorsed for collection is only bound to give notice to the bank in C., its immediate indorser. *Bank v. Chilton* 491.
4. When a notice has thus been given to said bank in the town of C., the duty devolves upon it to give notice of such protest to the prior indorsers, if it wishes to hold them as such. *Id.* 492.
5. Although one of said indorsers resides in the city of H., where said note was payable, said bank in the town of C. may send notice of such protest through the mail; and, if sent in due time, said indorser will be held, although he never receives the notice so sent. *Id.*
6. Under the circumstances of this case, the indorser residing in the city of H., where said note was payable, is not entitled to personal service of the notice of such protest, although he resides in the city where said note was made payable. *Id.*

NEW MATTER. See *Pleading* 7, 10.

NEW TRIAL. See *Evidence* 20.

NONSUIT. See *Pleading* 8.

NOTICE OF PROTEST. See *Negotiable Note* 3, 4, 5, 6.

NUISANCE.

1. A mill manufacturing powder and other explosives, and storing the same on the premises, situate on the bank of the Ohio river and near two railroads and a public road, is a public nuisance, and any one injured in property by explosion of powder stored there may recover damages without proof of negligence in its operation. *Wilson v. Powder Co.* 413.
2. Under Code, chapter 47, section 28, giving the council of a town power to abate a nuisance, but not prescribing the methods of procedure, upon a petition signed by fifty residents, supported by two affidavits fully describing the alleged nuisance, a merry-go-round, and praying that the owner might be summoned before the town council, a summons signed by the mayor only in the nature of an order to show cause, and reciting the facts set out in the petition, was issued. *Held*, that the procedure and summons were sufficient. *Town Davis v. Davis* 464.
3. A summons in the nature of an order to show cause, issued by a town council to a person charged with keeping a nuisance, not being a writ or process, within the meaning of Const. Art. II, sec. 8, need not run in the name of the state. *Id.*
4. Code, chapter 47, section 28, giving the council power to abate anything which, in the opinion of a majority of the whole council, shall be a nuisance, does not require the recorder, or more than a majority of the council, to be present at the hearing of a petition to abate a nuisance. *Id.*
5. Where the law gives the council of a town ample power to abate nuisances, and the council gives the person charged with maintaining the nuisance opportunity to be heard, it is unnecessary to resort to a court of equity for relief. *Id.*
6. A proceeding by a town council against a person for maintaining a nuisance is judicial in its character, and the decision is subject to review. *Id.*
7. The Constitution, Article VIII, section 3, giving the Supreme Court of Appeals jurisdiction in cases of *certiora i*, and not the clause fixing the court's jurisdiction by the value of the matter in controversy, determines the court's jurisdiction when error is brought on the ground that the Circuit Court refused defendant a writ of *certiorari* on a conviction by a town council for maintaining a nuisance. *Id.*
8. A mill, manufacturing powder and other explosives, and storing the same on the premises, situate on the bank of the Ohio river and near two railroads and a public road, is a nuisance *per se* *Wilson v. Manufacturing Co.* 40 W. Va., 413. *Development Co. v. Powder Co.* 711.

NUISANCE—*Continued.*

9. When a company engaged in the manufacture of powder and other explosives, without misrepresentation or concealment on its part, is induced to locate its works at great expense on lands adjacent to the property, and for the prospective benefit of a land development and improvement company, such latter company can not, on discovering that the proximity of such powder works has diminished instead of enhanced the value of its adjoining territory, enjoin the continuance of such works as a nuisance. *Id.* Also See *Private Nuisance*.

OATH TO MECHANIC'S ACCOUNT. See *Mechanic's Lien* 1.

OBLIGATION UNDER SEAL.

1. An obligation under seal imports valuable consideration, requiring no proof of the consideration, and neither at common law nor under section five, chapter one hundred and twenty six of the Code can want of consideration be shown in defense of an action on it. But, as to failure of consideration, that may, under that section be shown, though not at common-law. There is a difference between want and failure of consideration in such case. *Williamson v. Cline* 195.
2. Taking an obligation under seal for a simple contract debt merges it in the obligation, and thus extinguishes it, as the taking of a security of higher dignity extinguishes inferior securities for the same debt. *Id.*
Also *Married Women*.

OBSTRUCTION OF CULVERT.

1. A railroad company makes an embankment in a street on which to lay its track, and so negligently constructs it as to obstruct or close a culvert already there for passage of water, and by reason thereof at times water from rain or snow collects and floods an adjoining lot. Its owner may recover damages. *Henry v. Railroad Co.* 234.
2. The statute of limitations in such case begins to run, not from the date of the building of the embankment, but from the time of the actual injury from the invasion of the lot by the water; the injury being in law recurring, intermittent, and continuous. *Id.*

OCCUPATION BY COPARCENER. See *Tenancy in Common* 1, 2, 3.

ORAL ASSIGNMENT. See *Assignment of Chose in Action* 2.

ORAL CONTRACT. See *Insurance* 2.

ORAL EXECUTORY CONTRACT. See *Insurance* 1.

ORDINARY HAZARD. See *Master and Servant* 1.

OUTSTANDING INCUMBRANCE. See *Specific Performance* 2.

PAROL EVIDENCE. See *Assignment of Bond* 2.

PARTIAL INTESTACY. See *Construction of Trusts* 14.

PARTIAL PAYMENT. See *Bond* 2.

PARTICULAR INJURY. See *Pleading* 3.

PARTIES TO SUITS. See *Municipal Corporations* 8; *School Lands*.

PARTITION. See *Tenancy in Common* 6, 7.

PARTNERSHIP.

1. Stronger evidence of the existence of a partnership is required between partners than by third persons. *Hinkson v. Irvin* 111.
2. Under a bill for settlement of partnership account, the burden of proof is on the plaintiff; and if he can not furnish sufficient evidence to establish a partnership, and also to enable the commissioner to state a partnership account, his suit necessarily fails. *Id.*

PASS WAY. See *Easement* 4.

PATENT RISKS. See *Master and Servant* 6.

PAYMENT. See *Trust Fund*.

PAYMENT OF PREMIUM. See *Insurance* 6, 7.

PAYMENT OF STOCK SUBSCRIPTION. See *Corporations* 2.

PERMANENT INJURY. See *Private Nuisance*.

PERSONAL JUDGMENT. See *Wife's Separate Estate* 1.

PETITION. See *Chancery Practice* 5.

PLEADING.

1. In the action of trespass to realty, or an action on the case in lieu thereof under the statute, the place where the acts complained of were done is material and traversable, and the allegations thereof must in some way, either by the name of the land or close, by some or all of its abutments, by naming a particular locality, or in some other way, designate or describe such *locus in quo* with a reasonable degree of definiteness; otherwise the declaration will be bad on demurrer. *McDodrill v. Lumber Co.* 564.

PLEADING—*Continued.*

2. In passing upon a demurrer to a bill with which written documents are exhibited, as parts thereof, the court is not bound to accept as true and correct the allegations contained in the bill as to what such documents prove, or what is their effect in law, but may look to and go by the documents themselves. *Lockhead v. Waterworks* 553
3. A declaration in case against a city for personal injury by reason of a defect in a street crossing, alleging that the plaintiff fell, and thereby was "greatly injured, bruised, wounded and crippled," is not bad because it does not state the particular injury, as a broken leg, for instance. Where special damages consequent on the particular injury are claimed, it seems otherwise. *Yeager v. City Bluefield* 484.
4. A judgment on a verdict for the plaintiff virtually overrules all demurrers to the declaration and each count thereof. *State v. Hall* 455.
5. In an action of trespass on the case brought for the recovery of damages for mining and removing coal, the defendants tendered a special plea, which averred "that more than three years before the commencement of the suit, they entered into and were in peaceable possession of the close and land in the plaintiff's declaration and amended declaration, and each count thereof, mentioned and described, claiming title under a lease of the same for the purpose of digging and operating for coal and oil and other minerals, and that they continuously remained in such possession for the space of more than three years next before the commencement of this action, and have dug and bored, and in good faith expended money in such digging, boring, and operating, and this they are ready to verify." On objection, this plea is bad for want of certainty, and for this reason that it does not state under whom the lease mentioned is claimed. *Ferdue v. Coal and Coke Co.* 372.
6. There can not be an issue, where there is a plea of new matter, concluding with a verification, without a replication. *Henry v. Railroad Co.* 234
7. Where there is a plea of new matter, concluding with a verification, and the plaintiff fails to reply to it, there ought to be a judgment of *non prosequitur* against him, after a rule to reply, but such rule need not be served. *Id.*
8. Such a judgment would not bar a second suit for same cause, it having the effect of a nonsuit. *Id.*
9. Where there are two or more pleas, and one is good, though others be bad or found untrue, yet that plea defeats the action. *Id.*
10. A plea introduces new matter, and concludes with a verification, and there is no replication to it or joinder in issue, but the case is tried on its merits upon the evidence, including the evi-

PLEADING—*Continued.*

dence touching the defense set up in such plea, and a verdict found responsive to such plea, and no exception made to it on that score in the Circuit Court. This Court will not reverse for this cause, especially at the instance of him who failed to file a replication.
Id.

PLEADINGS AND EXHIBITS. See *Commissioner's Report* 3.

POSSESSION.

1. Actual possession being an element of complete legal title to real estate is *prima facie* evidence of such title in the possessor. One in such position may maintain trespass or trespass on the case for damage thereto, without further proof of his title.
Wilson v. Powder Co. 414.
2. Either actual or constructive possession will maintain trespass for damage to realty. *Id.*
Also *Agent 2; Evidence* 12.

POSSIBILITY OF ISSUE. See *Construction of Trusts* 13.

POSSIBILITY OF RESULTING TRUST. See *Construction of Trusts* 18, 19, 20.

POWER OF APPOINTMENT. See *Construction of Trusts* 4.

PRE-EXISTING DEBT. See *Negotiable Note* 2.

PRELIMINARY EXAMINATION. See *Criminal Law* 1, 2.

PRESUMPTION AS TO INTESACY See *Construction of Trusts* 15.

PRIORITIES OF CREDITORS. See *Creditor's Petition* 1;
Fraudulent Assignment.

PRIVATE NUISANCE.

Permanent injury from private nuisance. When there must be recovery of past and future damages in one suit, and when repeated suits as injury recurs may be brought, discussed. *Henry v. Railroad Co.* 284.

PRIVATE RIGHT OF WAY. See *Easement* 1, 3.

PRIVATE WAY. See *Easement* 5.

PRIVACY OF SUIT. See *Evidence* 15.

PROBABLE CAUSE. See *Criminal Law* 1, 2.

PROOFS OF LOSS. See *Insurance Policy* 7.

RAILROAD COMPANIES.

1. In order to charge a railroad company with damages for killing stock straying upon its track, negligence on the part of the company must appear, and the burden of showing it rests upon the plaintiff. *Maynard v. Railway Co.* 331.
2. The provision of section fourteen of chapter forty two of the Code, requiring railroad companies to construct and maintain cattle guards upon land condemned, is for the benefit of the landowner; and therefore the mere omission to do so will not entitle another party, whose stock is injured while straying upon the railroad track, by trains, to recover damages, though, but for the want of it, the stock would not have been where it was injured. *Id.*
3. The first, second and third points of the syllabus, in the case of *Haney v. Railway Co.* 38 W. Va. 570, approved. *Mannegan v. Railway Co.* 436.
4. The telegraph operator in charge of a signal station, who has control, by means of signal orders, of the running of trains over a block section of a railroad, is not the fellow servant of a brakeman injured on such block section by reason of such operator's negligent management of the running of such trains. *Id.*
5. The syllabus in the case of *Comer v. Mining Co.* 34 W. Va. 534, approved. *Id.*
6. The allegation in the declaration that the defendant, "without ringing the bell or blowing the whistle, or giving any warning whatever," is a general allegation, under which the plaintiff may introduce any evidence tending to prove any negligence on the part of the defendant wherein it failed to give warning of an approaching train. *Turner v. Railway Co.* 675.
Also *Contributory Negligence* 1.

RAILWAY TICKET.

1. By mistake a ticket agent selling a mileage ticket good for one year stamps upon it, as the date of issue, 4th March, 1892, instead of 1893. The passenger tenders it on 24th April, 1893, in payment of fare, but it is refused, and he is ejected for non-payment of fare. The passenger can recover damages. *Trice v. Railway Co.* 271.
2. By mistake a ticket agent selling a mileage ticket good for one year from issue stamps upon it, as the date of issue, 4th March, 1892, instead of 1893, and after the figures 189— writes the figure 3, making the date of the expiration of the book 4th March, 1893, and then corrects the latter mistake by writing over the 3 the figure 4, making it read 1894, not correcting the 1892. On 24th April 1893, the holder tenders this book in payment of fare, but it is rejected as out of date, and he is ejected from the train, after explaining to the collector that the agent had made the mistake, and he had himself not altered the ticket, and asking that the collector wait until the train reached Huntington, where the book was sold, so that the collector would be satisfied that the book had not been fraudulently altered; and the collector made no inquiry at any of several telegraph stations of the railroad company as to it. The passenger can recover damages of the company. *Id.*

REASONABLE DOUBT. See *Criminal Law* 3.

RECEIVER.

1. There is no fixed rule in this state as to the mode of allowing compensation to a special receiver, whether by way of commission or a fixed sum. Usually, when the fund is large, a lump sum is proper. The amount and mode of allowance are within the sound discretion of the court, under the circumstances of the particular case, subject to review on appeal. *Crumlish's Adm'r v. Railroad Co.* 627.
2. Where a decree appointing a special receiver is reversed wholly, without any reservation, his office ceases with reversal. *Id.* 628.
3. A receiver has no power or title until he give the bond required of him. *Id.*
4. A special receiver may be allowed fair and reasonable fees paid to counsel necessary in the execution of his receivership. Courts ought to authorize employment of counsel where it is intended to give such power, and they are indisposed to allow such fees without previous authority to incur them given the receiver. *Id.*
5. The amount of such counsel fees is within the sound discretion of the court, subject to review on appeal. Such fees are allowed to the receiver, not the counsel. *Id.*
6. In the absence of authority previously given, expenditures to be allowed a special receiver must be reasonable, and such as are proper, essential, and necessary in the due and ordinary execution of his office, and such as were contemplated in his appointment and according to the nature of his business. In extraordinary cases, involving a large outlay of money, the receiver should always apply to the court in advance, for authority to make it. *Id.*

RECEIVER'S BOND. See *Receiver* 3.

RECEIVER'S EXPENSES. See *Receiver* 6.

RECITALS. See *Lease* 2.

RECOVERY BY ASSIGNEE. See *Assignment of Chose in Action* 3; *Insurance Policy* 4.

RECOVERY OF DAMAGES. See *Obstruction of Culvert* 1.

RECURRING INJURY. See *Private Nuisance*.

REHEARING. See *Chancery Practice* 5.

RELATOR. See *Injunction Bond* 3.

REMARKS OF COUNSEL. See *Argument of Counsel* 2.

REMEDY. See *Town Counsel*.

REMOTE INTEREST. See *Construction of Trusts* 8.

REPAIRS BY COPARCENER. See *Tenancy in Common* 5.

REPLICATION. See *Pleading* 6, 7, 10.

RES ADJUDICATA.

In a suit involving, among other things, a debt between two corporations, a decree is rendered for a certain sum in favor of the one against the other, ascertaining the amount of the liability on the basis of the amount of paid-up stock of the creditor company. That decree is *res judicata* and estoppel between the companies as to the amount of recovery, and also as between the creditor company and its stockholders, and also between such stockholders as regards the amount of the recovery, but not as to the amount of paid-up stock in settling the rights of stockholders in the distribution of the fund arising from the debt so recovered. *Crumlish's Adm'r v. Railroad Co.* 627. Also *Wills* 1.

RESIDUARY LEGATEES. See *Construction of Wills* 2; *Wills* 2.

RESULTING TRUST. See *Husband and Wife* 3.

REVERSAL. See *Conflicting Evidence*; *Evidence* 3, 18; *Instructions* 3.

REVIEW OF EVIDENCE. See *Evidence* 14.

ROAD SURVEYOR. See *Constitutional Law* 1, 2.

RULE OF COURT. See *Instructions* 6.

SCHOOL BOARD.

A school board can not be compelled, by *mandamus* to make a special levy for the payment of illegal orders, or other evidence of debt issued by it contrary to section 8, art. X, of the constitution, and the laws enacted in pursuance thereof. *Dempsey v. Board of Education* 99.

SCHOOL LANDS.

The commissioner of School lands is neither a necessary nor proper party to a chancery suit brought in the name of the State of West Virginia, under section 6, chapter 24, Acts 1893, and therefore he is not entitled to appeal from the decrees of the Circuit Court in such suit. *Lawson v. Hart* 52.

SEAL. See *Deed* 1.

SECRET TRUST. See *Fraudulent Conveyance*.

SELF DEFENCE. See *Homicide* 1, 2, 3.

SEPARATE ESTATE. See *Husband and Wife* 1, 2.

SERVICE OF PROCESS. See *Corporations* 1.

SHERIFF. See *Tax Sales* 1.

SON'S SERVICES. See *Administrator* 2.

SPECIAL COUNT. See *Assumpsit* 2.

SPECIAL DAMAGES. See *Pleading* 3.

SPECIAL PLEA. See *Pleading* 5.

SPECIAL QUESTIONS. See *Instructions* 10.

SPECIFIC INSTRUCTIONS. See *Instructions* 7.

SPECIFIC LEGACY. See *Wills* 3.

SPECIFIC PERFORMANCE.

1. Where a vendor by executory contract, has conveyed the legal title to a subsequent purchaser for value, without notice, there can not be specific performance of the executory contract in favor of the first purchaser; but, if the second purchaser had notice, there can be, the conveyance to him being void as to the first purchaser, and he can be compelled to convey the land, without warranty, to the first purchaser. Proper decree in such case. *Bates v. Swiger* 420.
2. Where the land is subject to a life maintenance in favor of a third party, that is no impediment to a specific performance of a contract of sale with general warranty, if the purchaser will accept a conveyance with such warranty, and rely upon it for indemnity against such incumbrance. *Id.*

SPLITTING ACTION. See *Jurisdiction* 4.

STATEMENTS OF DECEDENTS. See *Evidence* 4, 5.

STATUTE OF DESCENTS, &c. See *Construction of Trusts* 20.

STATUTE OF FRAUDS. See *Insurance* 1.

STATUTE OF LIMITATIONS. See *Administrator* 1; *Obstruction of Culvert* 2; *Undelivered Writing* 2.

STATUTE OF WILLS. See *Construction of Trusts* 20.

STATUTORY REQUIREMENTS. See *Mechanic's Lien* 4, 5.

STOCK CERTIFICATE. See *Joint Stock Companies* 1.

STOCKHOLDER. See *Joint Stock Companies* 1, 2.

STRANGER TO DEED. See *Evidence* 16.

STREETS, &c. See *Municipal Corporations* 1, 2, 3, 4.

SUBROGATION.

1. Subrogation, being merely the creature of equity, and not of contractual nature, will be administered only in harmony with its fixed rules, in furtherance of justice. *Bates v. Swiger* 421.
2. Subrogation is not given to one who officiously, as a stranger, pays a debt of another. *Id.*
3. One guilty of fraud in the transaction in which he asks subrogation, as one who asks it must come before the court with clean hands, can not have subrogation. Therefore, a second purchaser, who, with notice of the right of a first purchaser, pays off a lien on the land, can not ask to be substituted to it. *Id.*
Also *Cosureties* 2.

SUBSEQUENT PURCHASER.

The fact that a subsequent purchaser had notice of a prior undocketed judgment may be inferred from circumstances, as well as proved by direct evidence. *Bates v. Farley* 540.

SUPREME COURT OF APPEALS, See *Bill of Review* 6;
Nuisance 7.

SURETY. See *Wife's Separate Estate* 2.

SURPLUSAGE. See *Evidence* 21.

TAXES.

Taxes are not a personal debt, or in the nature of a personal debt.
Dunn v. Rennick 350. Also *Wills* 1, 2, 3, 4.

TAX SALE.

1. Section 9 of chapter 31 of the Code reads as follows: "No sheriff, deputy sheriff, collector or other officer who shall return any real estate as delinquent for the nonpayment of the taxes thereon, or who shall receive a list thereof under the provisions of the fourth section of this chapter, or who shall sell by himself, his deputy or agent, or who shall be the deputy of any officer making such sale, shall directly or indirectly purchase any real estate so sold, or be in any way directly or indirectly interested with any other person in such purchase. Every person violating this section shall forfeit one hundred dollars for each offense, and the sale shall be absolutely void, and the title to the real estate sold

TAX SALE—*Continued.*

- shall remain in the person in whose name the same is sold." ural, common-sense implication fairly arising on the record according to the principles of evidence and ordinary means and methods of proof. *Phillips v. Minear* 56.
2. Where a sheriff who sells lands for non-payment of taxes under chapter 31 of the Code, appends to the list of sales not the affidavit required by law according to the form prescribed by section 13 of chapter 31, but, instead of saying in such affidavit, "I am not now, nor have I at any time been, directly or indirectly interested in the purchase of any of said real estate," substitutes therefor the phrase, "I am not directly or indirectly interested in the purchase of any of said land," and there being no other evidence of any kind on the point. Held, such sale is properly held to be void under section 9 of chapter 31. *Id.*
 3. It is not the object or effect of the curative section 25 of chapter 31 to impair or in any way or to any degree affect section 9 of chapter 31, or to prescribe that its violation may not be shown by implication. *Id.*

TELEGRAPH OPERATOR. See *Railroad Companies* 4.

TENANCY IN COMMON.

1. By common-law, one joint tenant, tenant in common, or parcener using the common land exclusively, but not ousting or excluding his co-owners, is not chargeable to them for use and occupation; but this rule has been changed by section 14, chapter 100, Code, as to joint tenants and tenants in common, but not as to parceners. *Ward v. Ward* 311.
2. A coparcener, merely from sole occupation of the premises, is not chargeable in favor of coparceners, unless he excludes them. *Id.*
3. Where it is proper to allow a coparcener for improvements, a charge for use and occupation may be set off against the improvements. *Id.*
4. Permanent improvements made by one coparcener, without request or agreement of others are not chargeable to the others personally or upon their shares in the land; but if made by their request or agreement, they are a debt upon them, and a lien on their shares in the land. *Id.*
5. One joint tenant, tenant in common, or coparcener can compel others to contribute to make necessary repairs to a mill or house, after request to assist and refusal. But this compulsion is as to future repairs, not those already made by one of the co-owners. This compulsion only applies to mills and houses, not to fences or other repairs to other properties. *Id.*
6. In partition the part improved, if it can be done without injury to others, should be assigned to the improver; but when this can not be done, the cost of improvement can not be charged to him to whom it goes. *Id.*

TENANCY IN COMMON—*Continued.*

7. Where, however, the property is not susceptible of partition, and must be sold to divide the proceeds, the coparcener who made repairs and permanent improvements shall receive out of the proceeds that amount by which the property, at the date of sale, remains enhanced in value from the improvements, not their original cost. *Id.* 612.

TENDER.

1. A strictly legal tender may be waived by an absolute refusal to receive the money, on the ground that no man is bound to perform a nugatory act. *Thompson v. Lyons* 87.
2. It is not necessary, to constitute a legal tender, that the identical money tendered was kept and brought into court. *Id.*
3. In general the effect of a tender in proper time by the debtor is to stop subsequent interest on the claim, if the money is unqualifiedly refused, which tender may be defeated by a subsequent demand and refusal. *Id.*
Also *Charge on Land* 3.

TIME FOR INSTRUCTIONS. See *Instructions* 6, 8.

TIME FOR CONSTRUCTION OF WILLS. See *Construction of Trusts* 10.

TITLE OF ASSIGNEE. See *Assignment of Chose in Action* 1.

TOLL. See *Grist Mill*.

TORTS. See *Damages* 5.

TOWN COUNCIL.

Where a person accused of maintaining a nuisance feels aggrieved by the decision of a town council, his remedy, if the statute gives no appeal, and no question is made that the statute is unconstitutional, or that the town authorities did not have jurisdiction of the subject-matter, is by *certiorari*, and not by prohibition. *Town of Davis v. Davis* 465.

Also *Liquor Licenses* 1, 2; *Nuisance* 2, 3, 4, 5, 6.

TRANSFER OF POSSESSION. See *Agent* 1.

TRESPASS. See *Pleading* 1; *Possession* 2.

TRIAL. See *Evidence* 18.

TRUSTEE. See *Agent* 2, 3; *Trust Fund*.

TRUST FUNDS.

Where a trustee pays a trust fund to one who receives it knowing he is not entitled, the true beneficiary may bring his suit in equity against both; but the decree should be against the one improperly receiving it as the principal debtor, and against the trustee, treated as his surety, to make good any deficiency. *Thomas v. Linn* 123.

Also *Commissions* 2.

UNAVOIDABLE ACCIDENTS. See *Lease* 4.

UNBORN DEVISEE. See *Construction of Trusts* 11, 12, 16.

UNCERTAINTY. See *Pleading* 5.

UNDELIVERED WRITING.

1. An action or suit can not be maintained on an undelivered writing or due bill found among the supposed debtor's papers after his death. *Cann v. Cann* 138.
2. Such writing, so found, is not sufficient acknowledgment to prevent the bar of the statute of limitations, but may, if genuine, be admissible as evidence to establish a *quantum meruit*. *Id.*

UNDOCKETED JUDGMENT. See *Subsequent Purchaser*.

UNINTERRUPTED USE. See *Easement* 3.

UNNECESSARY ALLEGATIONS. See *Evidence* 21.

VALUABLE CONSIDERATION.

1. Forbearance to sue being valuable consideration, if a creditor take from his debtor and a surety a note giving further time for payment, that is a valid consideration to bind the surety. *Williamson v. Cline* 185.
2. The words, "for value received," in a note, *prima facie* establish a valuable consideration, where it becomes necessary to prove such consideration. *Id.*
Also *Negotiable Note* 2.

VARIANCE. See *Forgery* 1, 2.

VENDOR'S LIEN. See *Charge on Land* 4.

VERDICT. See *Damages* 1, 6; *Evidence* 14, 17, 20; *Jurors* 1, 2; *Jury*.

VERIFICATION. See *Pleading* 6.

WAIVER. See *Bill of Review* 2; *Equity Practice* 1; *Instructions* 8; *Tender* 1.

WAIVER OF BREACH OF CONTRACT.

Where goods are shipped by the seller to one who had given an order for them, but they are shipped so late that the buyer is not bound under the contract to accept them, and he writes to the seller that it is too late to accept them, and that he will be compelled to return them, and the seller replies by mail, recognizing the buyer's right to reject and return the goods, but asking him to accept them, and saying if he will do so, that he will give the buyer an extra credit on the same for thirty days, and the buyer

WAIVER OF BREACH OF CONTRACT—*Continued.*

does not in any way reply to such offer within a reasonable time, and does not reship nor in any way attempt to return the goods to the seller, the buyer will be presumed to have assented to the seller's offer, and to have accepted the goods, and will be liable therefor as purchaser. *Ford v. Friedman* 177.

WAIVER OF ERROR. See *Pleading* 10.

WANT OF CONSIDERATION. See *Married Woman*.

WARD'S ESTATE. See *Guardian and Ward* 1.

WASTE. See *Cotenants* 6.

WAY OF NECESSITY. See *Easement* 2.

WEIGHT OF EVIDENCE. See *Instructions* 9.

WIFE'S SEPARATE ESTATE. *Judgment—Jurisdiction.*

1. By reason of chapter three, Acts 1893, a court of law has jurisdiction to entertain an action and render personal judgment against a married woman upon a contract made during coverture, binding her separate estate. *Williamson v. Cline* 184.
2. A bond executed by a married woman as surety for a debt of her husband is valid to bind her separate estate. *Id.*
3. A contract of a married woman, made since the enactment of chapter 3, Acts 1893, such as binds her separate estate, may be enforced against her separate estate, whether owned by her at the time of the contract or afterwards acquired, the same as if she were a *feme sole*. *Id.*
4. A judgment on such contract under said act binds as a lien the *corpus* or entire body of her estate in realty owned by a married woman. *Id.* 195.

WILLS.

1. A will directs executors to sell certain land to pay—First, a certain debt; next, a legacy to Mrs. Dunn; next, a legacy to Mrs. McNeal; and the residue of proceeds to be equally divided between them and two other children. The executors have a naked power to sell, and the legal title descends to those four children as heirs. The land sells for only enough to pay the debt and the principal of Mrs. Dunn's legacy. Taxes on the land subsequent to testator's death are paid by the executors, and in this Court, by a former decree before sale, they are held to "be entitled, as against the residuary legatees of a portion of the proceeds of said real estate, to credit for the taxes so paid." One of those children (John Dunn) is given a specific devise and legacy. *Held*, the former decree is not *res adjudicata* to fix upon any of the four residuary legatees, receiving nothing as such from the land, a liability to contribute to the payment of such taxes, either as residuary legatees, heirs, or persons. *Dunn v. Renick* 349.

WILLS—*Continued.*

2. They are not liable under the will, as residuary legatees, nor by law, as heirs, for such taxes. *Id.* 350.
3. John Dunn is not liable for such taxes by reason of his receiving other land and personalty by specific devise and bequest under the will. *Id.*
4. Such taxes and commission to the executors on sale must be abated from Mrs. Dunn's legacy by crediting them on the money in the executor's hands going to her from the sale. *Id.*
5. Demonstrative legacies are subject to abatement, but specific legacies are not. *Id.*
6. A will directs a sale of land by two executors. One only is present at the public auction, but the other consented that his co-executor make it, and ratifies and approves it. The sale is not invalid on these facts. *Id.* 351.
7. A will directs a sale of land by two executors. Before sale the executors bring a suit in equity to construe the will and administer the assets, making all persons interested parties, and in it decrees are made directing a sale of land by both or either of the executors. A sale is made and confirmed, and a bill of review is filed for reversal of the decree of confirmation. If there were error in the first decree, in giving power in either executor to sell, that decree being appealable and final, and relief against it by bill of review or appeal barred by limitation, reversal of the decree of confirmation would not affect it. It could not be reached by bill of review, and a sale by one executor under it would be valid, and beyond reach by such bill of review. *Id.*
Also see *Construction of Wills.*

WITHOUT RECOURSE. See *Assignment of Bond* 1, 2, 3.

WITNESS.

Where the burden is on a party to a suit to prove a material fact in issue, the failure, without excuse, to produce an important and necessary witness to such fact, raises the conclusive presumption that such witness' testimony, if introduced, would be adverse to the pretensions of such party. *Trust Co. v. McClellan* 405.

WRIT. See *Nuisance* 3.

WRIT OF PROHIBITION. See *Justice of the Peace* 2

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